Supreme Court, U.S.
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No._____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 2000

GOYA FOODS, INC., v. ULPIANO UNANUE-CASAL a/k/a/ CHARLES UNANUE, LILIANE UNANUE AND KALIF TRADING, INC.

Petition For A Writ Of Certiorari To
The United States Court Of Appeals For The First Circuit

PETITION FOR WRIT OF CERTIORARI

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April 5, 2001

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QUESTIONS PRESENTED

1. Whether the district court was obligated by the full faith and credit clause, or otherwise, not to recognize or enforce in any manner the New Jersey judgment until it had proceeded through exequatur proceedings required in the Commonwealth of Puerto Rico before judgments of state courts can be enforced in any manner.

2. Whether the Petitioners were wrongly denied the right to trial jury under the 7th Amendment of the United States Constitution as implemented by Federal Rules of Civil Procedure 39.

3. Whether the United States Court of Appeals for the First Circuit denied the Petitioners due process by deciding the appeal on a legal theory and in a subsequently issued errata with respect to which the Petitioners had no notice nor an opportunity to address.

4. Whether the United States District Court had in personam jurisdiction over the Petitioner Liliane Unanue.

5. Whether the Petitioners' properties were taken without due process of law in violation of the Fifth and Fourteenth Amendments of the U.S. Constitution.

PARTIES TO THE PROCEEDING

The parties to the proceeding below were petitioners, Liliane Unanue and Kalif Trading, Inc. ("Petitioners"), Ulpiano Unanue-Casal, a/k/a Charles Unanue, and respondent Goya Foods, Inc.

CORPORATE DISCLOSURE

There is no parent or publicly held company owning 10% of more the stock of Kalif Trading, Inc.

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Petition For A Writ of Certiorari To
The United States Court Of Appeals For The First Circuit

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit issued on November 28, 2000, and the subject of an errata on December 20, 2000.

OPINIONS BELOW

The judgment of the United States Court of Appeals for the First Circuit entered on November 28, 2000 is reprinted in the appendix hereto, together with that Court's opinion of November 28, 2000 and the errata thereto. The final judgment of the United States District Court for the District of Puerto Rico dated December 14, 1998 is reprinted in the appendix hereto, together with that Court's opinion dated October 31, 1997.

JURISDICTION

On November 28, 2000, the United States Court of Appeals for the First Circuit issued its Opinion and its Judgment in this matter. Petitioners' petition for rehearing was denied on January 5, 2001.

The jurisdiction of this Court to review the Opinion and Judgement of the United States Court of Appeals for the First Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const., Article IV, Sec. 1

> Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general Law prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

U.S. Const., Amendment V.

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a present or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offences to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const., Amendment VII.

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rule of the common law.

U.S. Const., Amendment XIV, Section 1.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 1738.

> The Acts of the legislatures of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.
>
> The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possession by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of that court

> that the said attestation is in proper form.
>
> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

STATEMENT OF THE CASE

For over thirty years, Ulpiano Unanue-Casal (a/k/a Charles Unanue, or "Charles") has been engaged in an epic dispute with his father and brothers concerning his over 24% ownership in Goya Foods, Inc. ("Goya"), and the family owned companies affiliated with Goya ("Goya Companies"). The dispute has been litigated in various forums in the United States and Puerto Rico and, since 1987, has focused on Charles' claim to inherit his share of his parents' estates under the binding laws of the Commonwealth of Puerto Rico.

Prior to 1969, Charles, his father and his brothers were the shareholders, officers and directors of Goya and he and his brothers were the shareholders, officers and directors of the other Goya Companies. After Charles made a public disclosure of tax and other accounting improprieties which his brothers and father refused to correct, Charles' father and brothers voted to discharge him as an officer, director and employee of the corporations in June 1969. Thereafter, extensive litigation ensued which was settled by an agreement dated June 9, 1972 ("1972

Agreement"). A dispute arose over whether Goya breached that agreement, and further litigation ensued only to be settled by an agreement dated July 31, 1974 ("1974 Amendment"). One of the terms of the 1974 Amendment was that Charles would waive his future inheritance from his father, Prudencio Unanue ("Prudencio").

Prudencio died in 1976. During the last five years and four months of his life, his father voluntarily resided in and did not leave Puerto Rico. Under Puerto Rico statutory law, the purported waiver of a future inheritance is void. This entitled Charles to inherit one-fifth of his father's estate as a forced heir, and one fourth of his mother's estate, both under the terms of her will and as a forced heir. Charles was unaware of this until after his mother, Carolina Unanue ("Carolina"), died.

Carolina died in 1984, after an uninterrupted residence in Puerto Rico for more than 13 years. Upon her death, Charles inquired of his brothers, who were her executors, about his mother's estate. Charles expected her estate to include an undivided one-half interest in voting control of the Goya Companies. This expectation arose from the creation of a *sui generis* legal entity known as a conjugal partnership upon the marriage of Charles' mother and father in Puerto Rico, which continued in existence throughout their marriage and which (by Puerto Rico statute) owned all of the assets acquired during the marriage, irrespective of the location of the assets or the spouses. Charles learned, however, that through the creation of a trust by Charles' father and through changes in voting rights authorized by his father, all without the knowledge or consent of his mother, she and her heirs were deprived of her 50% interest in shares having voting control of all the family business, the Goya Companies.

In response to Charles' demand, and even though Charles had no contacts with New Jersey, his brothers as executors of his father's estate commenced an action in New Jersey seeking a declaratory judgment that Charles was not entitled to inherit from his father. Shortly thereafter, Charles commenced an action in Puerto Rico seeking his inheritances from his parents and aunt, all of whom he contended were citizens of Puerto Rico pursuant to 48 U.S.C. § 733a and were domiciled there when they died. Other litigation also ensued. In 1990, before the litigations between Charles and his brothers and Goya had been resolved, Charles filed for bankruptcy in Puerto Rico.

The automatic stay of the bankruptcy proceedings was lifted by the Bankruptcy Court to enable the New Jersey court to conduct proceedings with respect to the domicile of Charles' father. By consent order in that action, Charles was substituted out of that case in 1991, and the bankruptcy trustee succeeded him as the defendant.

On December 4, 1991, the New Jersey court issued an opinion concluding that Charles' father was domiciled in New Jersey on the date of his death even though, pursuant to 48 U.S.C. § 733a, he was a citizen of Puerto Rico. That opinion did not address any issue other than Prudencio's domicile, such as the claim filed by Charles in Puerto Rico to inherit from Carolina.

After the district court reversed the bankruptcy court's decision not to completely lift the automatic stay, Charles' brothers and Goya then filed a summary judgment motion in the New Jersey action which sought to: (1) declare Charles in breach of the 1974 Amendment (notwithstanding that it violated fundamental inheritance and other laws of Puerto Rico and was thus illegal); (2) enforce the penalty clause of the 1974 agreement for twice the attorney's fees and costs

incurred; and (3) declare that Carolina's estate did not include the conjugal partnership's interest in the Goya shares and that Charles had no right to claim an interest in Prudencio's estate. Goya (and Charles' brothers) sought these declarations even though Charles' claim to his mother's estate had not been filed in the New Jersey probate proceeding and no discovery had been conducted on the complicated factual issues underpinning their effort to enforce the subject contracts. The New Jersey court granted the motion and, *inter alia*, ultimately entered a judgment of $6.9 million against not just the bankruptcy estate which was the party-defendant in the proceeding, but also against Charles individually who was no longer a party. The New Jersey court declared that Charles had no right to assert a claim to Carolina's estate for any shares in the Goya companies under any theory because of his waiver of his inheritance from Prudencio and so refused to recognize the binding laws of Puerto Rico governing forced heirship and conjugal partnership in violation of the full faith and credit clause of the United States Constitution. The New Jersey court also ignored the civil law conjugal partnership system and, instead, applied conflicts principles arising in community property states, which was in effect a refusal to recognize statutory conjugal partnerships created in Puerto Rico. In other words, it refused to give full and faith and credit to the valid laws of Puerto Rico.

After the New Jersey judgment was issued, the bankruptcy court dismissed Charles' bankruptcy proceedings on the grounds, *inter alia*, that Charles had no assets and Charles had no creditors other than Goya. Two months after that dismissal, in November 1995, Goya instituted the present action in Puerto Rico against Charles, his wife, Petitioner Liliane Unanue ("Liliane") and Petitioner Kalif Trading, Inc. ("Kalif"). Goya asserted that federal jurisdiction existed under 28 U.S.C. § 1332, alleging diversity of citizenship. Goya alleged that three condominiums in Puerto Rico owned

by Kalif or Emperor Equities, Inc. ("Emperor") and two interests in cooperatives in New York held by Liliane (none of whom were parties to the New Jersey action which issued the judgment Goya was trying to enforce) were the result of fraudulent conveyances made by Charles.

Goya commenced this action by obtaining *ex parte* orders purporting to freeze those assets. Liliane, a resident and domiciliary of New York, moved to dismiss for lack of personal jurisdiction on the grounds that she did not have contacts with Puerto Rico which could sustain the exercise of jurisdiction over her, or in the alternative to transfer the matter to the Southern District of New York. Charles also moved for dismissal after showing that he was no longer a resident of Puerto Rico, and had not been a resident at the time the suit was commenced. The district court denied those motions based upon its finding that Charles had transferred one of the Puerto Rico condominiums to Kalif. However, although Goya had claimed such a transfer had occurred, the proofs at trial showed that the condominium unit was never owned by Charles or by any entity in which Charles had an ownership interest. Moreover, the district court could not explain how an alleged previous ownership of property by Charles became a basis for the assertion of jurisdiction over Liliane. Even after trial, when the claimed basis for jurisdiction was shown not to exist, the district court proceeded to enter judgment. In addition, property which Goya was seeking to obtain through these proceedings was owned by Emperor, a Delaware corporation like Goya but which was owned by Liliane, and its joinder was thus required and would also have prevented diversity from existing as the basis for jurisdiction in this action.

Goya commenced this action without domesticating the New Jersey judgment in Puerto Rico as required by the law of Puerto Rico. Until a foreign judgment has been

domesticated through exequatur proceedings, it is unenforceable in any manner in Puerto Rico. The process of exequatur affords the parties against whom the judgment is asserted the opportunity and right to contest the jurisdiction of the court that rendered the judgment, any lack of due process before that court, and whether the judgment is so repugnant to the fundamental laws and policies of Puerto Rico that it will not be enforced. Notwithstanding such a requirement, the district court proceeded to enforce the judgment in Puerto Rico without any exequatur. Moreover, when the issue of the invalidity of the New Jersey judgment was raised in the proceedings below, the district court refused to hear evidence of its invalidity despite the well settled principle that due process requires that one be afforded an opportunity to challenge the validity of a foreign judgment.

Beyond asserting jurisdiction over persons without the requisite contacts with the forum, and beyond proceeding to enforce a judgment which was unenforceable under the law of Puerto Rico, the district court also denied the defendants a trial by jury. Liliane had timely demanded a jury trial. The district court entered default and suppressed her answer and struck her counterclaim, as requested by Goya, because prior to the proceeding Liliane had not kept her personal bank account (into which the proceeds of an earlier court order sale of shares of a cooperative corporation (Sutton House) had been deposited) in compliance with generally accepted accounting practice ("GAAP") standards which may be applicable to corporations but not individuals. The trial court then decided that, as a result of the default entered against Liliane, there would not be a jury trial for any of the other defendants even though they had not stipulated to a non-jury trial after Liliane had made a timely jury demand. At the time of trial, the district court essentially vacated the default and permitted Liliane to fully participate in the trial,

but conducted the trial without the jury that Liliane had demanded.

Before the trial court, two bases for Liliane's liability were asserted. First that she held the property as a result of fraudulent conveyances from Charles, and second that she was his alter ego. At trial, Goya conceded that it did not have proof of any fraudulent conveyance, and the district court made no finding of any such conveyance from Charles to Liliane Indeed, Goya's effort to prove a fraudulent conveyance was stymied in large part by the fact that most of the property at issue was acquired by Liliane, Kalif, and Emperor at a time when there were no claims outstanding between Charles and Goya and the rest of his family. Instead, the district court attempted to apply principles of piercing the corporate veil to conclude that Liliane was the alter ego of Charles. The district court entered judgment for Goya and against Liliane and Kalif, to permit Goya to satisfy its $6.9 million judgment against Charles from certain property owned by Liliane, Kalif, and Emperor. On appeal, the United States Court of Appeals for the First Circuit agreed that the proofs and findings could not sustain a claim of fraudulent conveyances. It also held that the Liliane was not the alter ego of Charles. However, rather than reversing the judgment, the First Circuit, without notice to the defendants nor the benefit of any briefing or argument by them on the issue, raised on its own a theory of constructive trust and affirmed the judgment on that basis notwithstanding a lack of findings supporting the elements that the court identified as necessary for the imposition of such a remedy, such as any proof that Charles had made transfers with an intent to defraud creditors or funded the acquisitions of Liliane's, Kalif's or Emperor's assets.

While the parties were awaiting the decision of the Court of Appeals, Goya alleged by *ex parte* order to show

cause in the district court that shares in a New York cooperative (625 Park Corp.) that had been owned by Liliane (but which had been sold after the judgment was entered in the district court) were subject to the judgment. The district court, in apparent reliance upon the language of its judgment that purported to reach any "residence" in Liliane's name, found Charles and Liliane to be in contempt because of that sale. The district court issued warrants for the arrest of Charles, who was not an owner of the shares, and Liliane, directing that they be held without bail and brought to Puerto Rico.

When the Court of Appeals issued its Judgment and Opinion of November 28, 2000, it held that the district court's reference to any "residence" in Liliane's name was too broad, and stated that the judgment only applied to three named "real properties," namely one property in New York, one in Paris, and one in Spain. The district court judgment specifically identified one New York residence, the Sutton House cooperative, as well as the property in Paris and Spain. When it thus appeared that the sale of the shares of 625 Park Corp. (which the district court had found were purchased by Liliane with a loan from a commercial bank, which the district court did not find was repaid by Charles, and which, in any event, did not constitute "real property") may not rightfully be included in the judgment, an "errata" was issued from the Court of Appeals amending the opinion to supposedly subject the shares to the district court's judgment. The genesis of that errata is unknown, and upon inquiry to the Court of Appeals it was stated that the errata did not alter any substantive determinations of the November 28, 2000 decision.

Reasons For Granting The Writ

POINT I

THE NEW JERSEY JUDGMENT COULD NOT HAVE BEEN GIVEN FULL FAITH AND CREDIT IN PUERTO RICO IN THE ABSENCE OF DOMESTICATION AND VALIDATION OF THE JUDGMENT THROUGH EXEQUATUR PROCEEDINGS.

The requirement that the New Jersey judgment be domesticated through an exequatur proceeding is a particularly important matter with respect to Liliane and Kalif. Neither Liliane nor Kalif were parties to the New Jersey proceedings, and neither had any opportunity to contest the assertion of jurisdiction by the New Jersey courts over Charles when the party to that action was his bankruptcy estate and not Charles personally.

While 28 U.S.C. § 1738 requires a federal court to give full faith and credit to judgments from the courts of other states, the giving of such effect is not an automatic and mechanical act. Full faith and credit is not to be given when the state court did not have jurisdiction over the subject of the litigation or of the parties to the litigation. See, Underwriters Nat'l. Assurance Co., v. North Carolina Life and Accident and Health Ins. Guar. Ass'n., 455 U.S. 691, 704-05, 102 S.Ct. 1357, 1366, 71 L.Ed.2d 558 (1982); Browning v. Navarro, 887 F.2d 553, 563 (5th Cir. 1989), rehearing denied, 894 F.2d 99 (5th Cir. 1990). Hence, a party may contest the jurisdiction of a court that issued a judgment that is sought to be enforced in another forum. Id. Here, it was a gross misapplication of the principles of

full faith and credit for the courts below to enforce the New Jersey judgment which had not been validated in an exequatur proceeding, attaching the property of persons not party to that judgment, and refusing to hear any challenge to that judgment. See, Amy v. Adm. Deporte Hipico, 116 D.P.R. 414 (1985).

The issue of domestication is jurisdictional and does not prescribe. Moreover, the validity of the New Jersey judgment was challenged during trial and renewed thereafter. An exequatur proceeding was thus necessary for the enforcement of that judgment. Ex parte Petra Márquez Estrella, 128 D.P.R. 243 (P.R. 1991). Until it has been validated in an exequatur proceeding, a state court judgment is unenforceable in any manner in Puerto Rico. Id.

Exequatur is a process governing when foreign judgments are to be afforded full faith and credit under Article 4 of the U.S. Constitution, and it assures that a defendant has received due process of law under the Fifth and Fourteenth Amendments of the U.S. Constitution. Id. As set forth in Marquez Estrella, judgments from a state are foreign judgments which do not operate directly or *ex proprio vigore*, but "*require* local court recognition . . . before they can *in any manner* be enforced in the Commonwealth of Puerto Rico." (Id., emphasis added). Hence, unless and until the foreign judgment has undergone exequatur, a court siting in Puerto Rico lacks the jurisdiction to enforce the judgment *in any manner* in Puerto Rico. Being a matter relating to the court's jurisdiction over the subject foreign judgment, objections relating to a lack of exequatur are not barred by time alone and may be raised even on appeal. See, Sea-Land Services, Inc., 160 F.3d 849 (1st Cir. 1998) (issue of lack of personal jurisdiction is not foreclosed by the one year provision of

Fed. R. Civ. P. 60); In re School Asbestos Litigation, 921 F.2d 1310, 1316 (3rd Cir. 1990), cert. denied, 449 U.S. 976, 111 S.Ct. 1623, 113 L.Ed.2d 720 (1991) (subject matter jurisdiction is not subject to waiver).

The New Jersey judgment, having been obtained in violation of the requirements of due process (being entered against Charles after he was no longer a party, and when it had neither personal jurisdiction over Charles or the estate of Charles' mother) and being repugnant to such fundamental principles of Puerto Rican law and public policy as embodied in the statutes governing forced heirship and conjugal partnerships, could not have qualified for enforcement in the Commonwealth of Puerto Rico.

The district court actually refused to consider issues such as the lack of due process in the New Jersey proceedings and the repugnancy of the foreign judgment to the public policy, principles and laws of Puerto Rico. Such matters are the proper subject of exequatur proceedings. Marquez Estrella, supra.

Any decisions in the prior proceedings in the New Jersey litigation do not obviate the requirement of exequatur proceedings to render that foreign judgment enforceable within Puerto Rico, especially when Liliane and Kalif were not parties to the New Jersey proceedings. They remain fully entitled to require domestication of the New Jersey judgment as part of their own entitlement to due process.

POINT II

PETITIONERS WERE WRONGLY DENIED THEIR CONSTITUTIONALLY PROTECTED RIGHT TO TRIAL BY JURY.

It is well settled that "[m]aintenance of the jury as a fact-finding body is of such importance in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." Dimick v. Schiedt, 293 U.S. 474, 486, 55 S.Ct. 296, 301, 79 L.Ed. 603 (1935), *quoted in*, Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 501, 79 S.Ct. 948, 3 L.Ed.2d 988 (1959).

The right to a jury trial was wrongly curtailed below. Liliane made a timely demand for trial by jury. Although default was wrongly entered against her, it was *de facto* vacated at the time of trial. With a jury demand having been made by this party participating in the trial, the matter was required to be tried before a jury absent a stipulation to the contrary by *all* parties or a finding that no right to trial by jury existed with respect to the issues. Fed. R. Civ. P. 39(a). Beacon Theatres, supra, 359 U.S. at 510; Collins v. Government of Virgin Islands, 366 F.2d 279 (3rd Cir. 1966), cert. denied, 386 U.S. 958, 87 S.Ct. 1026, 18 L.Ed.2d 105 (1967); Taylor v. Gulf States Utilities Company, 375 F. 2d 949, 950 (5th Cir. 1967), cert. denied, 389 U.S. 871, 88 S.Ct. 154, 19 L.Ed.2d 151 (1967). There was neither such a stipulation nor finding, yet the trial court dispensed with a jury.

This Court has long adhered to the principles that "[i]n Federal courts this (jury) right cannot be dispensed

with, except by the assent of the parties entitled to it; nor can it be impaired by any blending with a claim, properly cognizable at law, of a demand for equitable relief in aid of the legal action, or during its penance." Scott v. Nealy, 140 U.S. 106, 109-10, 11 S.Ct. 712, 714, 35 L. Ed. 358 (1891), *quoted in*, Beacon Theatres, supra, 359 U.S. at 510. Here, the trial court did *not* find that the issues were not issues triable before a jury (nor did it make any alternative finding that the issues were equitable in nature).

Rather, it is well established that the issues in this matter are triable before a jury. Actions outside of the bankruptcy court for the recovery of money which has been wrongfully transferred with respect to creditors are actions at law as to which there is a right to trial by jury, even where an alter ego theory is urged as a basis for the liability. See, In re Blinder Robinson & Co., Inc., 135 B.R. 892, 895-896 (D. Colo. 1991); Bower v. Bunker Hill Co., 675 F.Supp. 1254 (E.D. Wa. 1986). The right to a jury trial also exists with respect to claims based upon a theory of fraudulent conveyance or unlawful preference of creditors. In Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 109 S.Ct. 2782, 106 L.Ed.2d 26 (1989), this Court determined that "actions to recover preferential or fraudulent transfers were often brought at law . . . " and were conducted before juries. Id., 492 U.S. at 43. This Court concluded that the Seventh Amendment guaranteed a jury trial in such matters.

Furthermore, if the present action is alternatively characterized as an one to collect a debt, or for the possession of real or personal property, this Court has held that the Seventh Amendment guarantees the right to trial by jury. See, Hepner v. United States of America, 213 U.S. 103, 29 S.Ct. 474, 53 L.Ed. 720 (1909); Pernell v. Southall Realty, 416 U.S. 363; 94 S.Ct. 1723, 40 L. Ed. 2d 198

(1974); Whitehead v. Shattuck, 138 U.S. 146, 11 S.Ct. 276, 34 L. Ed. 873 (1891).

Although the Court of Appeals intimated that because it had found a constructive trust the right to a jury trial may not be triggered, the parties never asserted or argued such a theory during the pendency of the action. The action was always one of a legal nature from the beginning, and even though the so-called equitable remedy of constructive trust was ultimately imposed, the admonition of this Court in Scott v. Nealy, supra, that the jury right can not be impaired by any blending of a legal action with an equitable claim, should be heeded.

The district court focused solely on the issue of its entry of a default against Liliane as precluding a jury trial as to her. Not only did this disregard the *de facto* vacation of default at the commencement of the trial, but it disregarded the right of Kalif and Charles to a jury trial by virtue of Liliane's earlier jury demand absent the written stipulation or oral stipulation in open court required by Federal Rule of Civil Procedure 39. Instead of addressing this right which arose from Liliane's jury demand, the district court obfuscated the issue by concluding that Kalif and Charles had failed to demand a jury in their answers and thus were not entitled to a jury, contrary to Federal Rule of Civil Procedure 39. The district court and the Court of Appeals also violated Petitioners' Seventh Amendment right when they ruled that Liliane was not entitled to a jury trial because a *default* had been entered; yet these courts identified no authorities that entry of a default, as opposed to a judgment by default, is a ground for denying a party their Seventh Amendment right when trial is later held.

Although there are many federal cases addressing whether the constitutional right to a jury trial is extinguished after the entry of *judgment* by default, there are no cases dealing with the specific issue of loss of the right to a jury after a mere default is entered and then vacated. With regard to the right to a jury trial after judgment by default, some courts hold that it is within the discretion of the trial court whether to allow a jury trial in order to determine damages, whereas other courts hold that there is no jury trial right on damages after judgment by default. *Compare* Bass v. Hoagland, 172 F. 2d 205, 209-10 (5th Cir.), cert. denied, 338 U.S. 816, 70 S.Ct. 57, 94 L.Ed. 494 (1949); Barber v. Turnerville, 218 F. 2d 34, 37 (D.C. Cir. 1954); Hutton v. Fischer, 359 F. 2d 913, 916 (3d Cir. 1966); Frankart Distributors, Inc. v. Levitz, 796 F. Supp. 75, 77 (E.D.N.Y. 1992); *with* In re Dierschke, 975 F. 2d 181, 185 (5th Cir. 1992); Adriana Int'l Corp. v. Thoeren, 913 F. 2d 1406, 1414 (9th Cir. 1990), cert. denied, 498 U.S. 1109, 111 S.Ct. 1019, 112 L.Ed.2d 1100 (1991); Henry v. Sneiders, 490 F. 2d 315, 318 (9th Cir.), cert. denied, 419 U.S. 832, 95 S.Ct. 55, 42 L.Ed.2d 57 (1974), rehearing denied, 419 U.S. 1060, 95 S.Ct. 644, 42 L.Ed.2d 657 (1974).

In the Barber decision, supra, the Court of Appeals reversed a default judgment and remanded the case for a new trial. 218 F. 2d at 36. In so doing, the court noted that it was the better practice, if not actually required, that the issue of damages after default judgment be submitted to a jury. Id. at 37. Although in the context of a default judgment and not a mere default, the rationale for that court's decision is applicable here. The court reasoned that the right to a jury was not extinguished because the jury demand had been made on the initial pleadings, because the trial judge did not make a finding that the right to a jury trial was not appropriate under the Constitution or statutes

of the United States, and because the defendant did not consent to an abandonment of her right to a jury determination. This reasoning is equally applicable to the present matter: Liliane made a valid jury demand in her answer, the trial court did not find that the matter was one where the right to a jury trial did not exist under the Constitution or otherwise, and Liliane (and the other defendants) did not consent to an abandonment of their rights.

Accordingly, a writ of certiorari should be granted because the Petitioners have been wrongly denied the right to trial by jury that is afforded to them by the Seventh Amendment based upon a manifestly erroneous interpretation of when the right to trial by jury attaches to parties that have not demanded it, and based upon an unsupported theory that the entry of a default forfeits the right to a jury in a trial conducted in that action.

POINT III

THE DETERMINATION BY THE COURT BELOW OF MATTERS WHICH WERE NOT PLACED IN ISSUE BEFORE IT, AND WHICH DETERMINATIONS WERE MADE WITHOUT FAIR NOTICE TO THE PETITIONERS, CONSTITUTES A DENIAL OF DUE PROCESS.

In this matter, the United States Court of Appeals for the First Circuit entered judgment with respect to matters which had not been pleaded, and made determinations without fair notice that it would rule on issues which had not been placed before it by the pleadings. In so doing, it has come into conflict with a leading pronouncement by this Court of the principal of procedural due process.

"For more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.'" Fuentes v. Shevin, 407 U.S. 67, 80, 92 S.Ct. 1983, 1994, 32 L.Ed.2d 556, 569 (1972), rehearing denied, 409 U.S. 902, 93 S.Ct. 177, 34 L.Ed.2d 165 (1972) (quoting from Baldwin v. Hale, 68 U.S. (1 Wall.) 223, 233, 17 L.Ed. 531, 534 (1864)).

The Court's affirmance upon a theory of constructive trusts that was not raised or litigated below, and which was not decided by the district court, denies Petitioners due process under the Fifth and Fourteenth Amendments of the U.S. Constitution by failing to afford

them adequate notice of the basis on which liability was being asserted and by failing to afford them an adequate opportunity to address the claim which was being made against them. Byrd v. Blue Ridge Rural Electric Cooperative, 356 U.S. 525, 78 S.Ct. 893, 2 L.Ed.2d 953, rehearing denied, 357 U.S. 933, 78 S.Ct. 1366, 2 L.Ed.2d 1375 (1958). See also, Gorman v. University of Rhode Island, 837 F.2d 7 (1st Cir. 1988); Collucci v. Collucci, 58 N.Y. 2d 834, 837, 446 N.E.2d 770, 460 N.Y.S.2d 14 (1983) (any power to grant relief on a new theory of recovery may not be exercised against a party who has had no notice or opportunity to defend against that theory).

In Byrd, supra, the trial court struck an affirmative defense at the close of all evidence. On appeal, the striking of the affirmative defense was reversed, and then the court made its own determination on the record entering judgment for the defendant. The appellate court's judgment was reversed on certiorari. In reversing, this Court held:

> At all events, the petitioner is plainly entitled to have an opportunity to try the issue under the Court of Appeal's interpretation. [356 U.S. at 532].

In the present matter, Petitioners are in essentially the same position as was the plaintiff in Byrd. The case was tried before the district court, proofs were presented, and argument was advanced on the two issues that were before that court (i.e., the fraudulent conveyance claim and the alter ego claim). The Petitioners prevailed upon those claims; but on appeal the Court of Appeals interjected a new issue into the case, i.e., a constructive trust theory of liability, after the appeal had been argued. The Petitioners were thus denied any opportunity to address this claim by

way of either presenting proofs or presenting argument against the applicability of the constructive trust theory.

The Collucci holding requiring notice and an opportunity to address any new theory has been cited in the context of imposing a constructive trust in DiNicola v. Bouchard, 233 A.D.2d 594, 649 N.Y.S.2d 239 (N.Y.A.D., 3 Dept. 1996). See also, Matter of Ellen K. v. John K., 186 A.D.2d 656, 588 N.Y.S.2d 625, 658 (N.Y.A.D., 2 Dept. 1992), reargument denied, 73 N.Y.2d 912, 536 N.E.2d 622, 539 N.Y.S.2d 293 (1989); Lichtman v. Grossbard, 73 N.Y.2d 792, 533 N.E.2d 1048, 537 N.Y.S. 2d 19, 21 (1988).

This was not a mere minor procedural miscue by the Court of Appeals; but in fact was a major denial of the most fundamental concepts of due process which affect significant substantive rights. It would exceed anyone's sense of fairness and due process for United States citizens to be haled into Puerto Rico upon what is there a foreign judgment, and in the process (a) be denied the procedural safeguard that foreign judgments be first domesticated through exequatur proceedings, (b) be denied the opportunity to even contest the validity of the judgment on which they are being sued, and (c) after successfully creating a factual record which precludes one of two theories of liability and after further prevailing as a matter of law on appeal on the second of the two theories, then to have the court on appeal put forward a new theory as a basis for the judgment and in the process deny the defendants the opportunity and right to even contest the factual inapplicability of that new theory and the legal errors in it assertion.

Due process requires that a party be given fair warning of what he must confront, and an opportunity to

confront the claim that is made. See, Rose v. Locke, 423 U.S. 48, 96 S.Ct. 243, 46 L.Ed.2d 185 (1975). As stated in Boddie v. Connecticut, 401 U.S. 371, 377, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971):

> due process requires, at a minimum, that . . . persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard. Early in our jurisprudence, this Court voiced the doctrine that '[w]here one is assailed in his person or his property, there he may defend.' Windsor v. McVeigh, 93 US 274, 277, 23L Ed 914, 915 (1876). See, Baldwin v. Hale, 1 Wall 223, 17 L Ed 531 (1864), Hovey v. Elliott, 167 US 409, 42 L Ed 215, 17 S Ct 841 (1897). The theme that 'due process of law signifies a right to be heard in one's defence,' Hovey v. Elliott, supra, at 417, 42 L Ed at 221, has continually recurred in the years since Baldwin, Windsor, and Hovey.

Moreover, the opportunity to be heard must be granted in a meaningful time and in a meaningful manner. Armstrong v. Manzo, 380 U.S. 545, 552, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965). See, Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed 865 (1950) (notice must afford interested parties an opportunity to present their objections). Without notice of what claim is to be met before a decision is rendered, there can be no meaningful opportunity to defend oneself.

The unorthodox, and after the fact approach, taken by the Court of Appeals in substantively amending the November 28, 2000 decision by means of an errata at a

time when there was pending before the district court issues relating to the scope of the judgment, effects another denial of due process. Once again, without any opportunity of the parties to be heard on the issue, the Court of Appeals again undertook on its own initiative to issue a determination on a matter which was in dispute but otherwise not before it. Moreover, it is not a matter of minor significance to Liliane and Charles, but a matter that goes beyond mere property rights and affects their personal freedom.

Here, the Petitioners were denied any notice and any meaningful opportunity to defend themselves against the constructive trust theory which was not tried or decided in the district court but which was raised *sua sponte* by the Court of Appeals in its decision, as well as denied the opportunity to address the issue that was the subject of the errata which the First Circuit issued. Indeed, the constructive trust theory adopted by the court below was not even the subject of oral argument. The sudden adoption of a wholly new basis of liability, after trial has occurred on other theories which were not sustained, is a denial of due process for which the writ of certiorari should be granted.

POINT IV

THE COURTS BELOW LACKED JURISDICTION OVER PETITIONERS

Early in this action, Liliane moved for a dismissal of this action on the grounds that the court lacked jurisdiction over her, supported by a sworn statement that she had no minimal contact with Puerto Rico. The motion was denied, with the court below basing its assertion of personal jurisdiction over her upon the factually incorrect determination that Charles or Liliane had transferred an

apartment in Puerto Rico to Kalif Trading in 1983. After trial, the court found instead that the apartment acquired by Kalif Trading was transferred by Emperor, an entity that Goya deliberately chose not to make a party to this action. Although the factual basis upon which the trial court asserted jurisdiction over Liliane was ultimately found not to exist, judgment was nonetheless entered against her.

It is well settled that there must exist sufficient contacts between the party and the forum so that the assertion of jurisdiction over the party does not offend traditional notions of fair play and substantial justice. See, e.g., International Shoe Co. v. Washington, 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95 (1945) and its progeny. Such contacts were not established here with respect to Liliane. At the time of suit, she was not a resident of Puerto Rico; and had even been required to post a non-resident's bond in 1986 in legal proceedings in Puerto Rico. She owned no real property in Puerto Rico. The alleged contact upon which the trial court based its assertion of jurisdiction (i.e., the alleged transfer of an apartment to Kalif Trading by Charles or Liliane) was never established at trial. As the trial court lacked jurisdiction over Liliane, the judgment is invalid and cannot be sustained.

In addition, the case should have been dismissed because a party necessary for an adjudication of the claims was not joined, and its joinder would have deprived the court of jurisdiction. Real property against which Goya was seeking to satisfy the New Jersey judgment was owned by Emperor, a Delaware corporation. Emperor, having title to the property which Goya claimed was owned by Charles, thus became a party whose joinder was required so that it could protect its rights with respect to the properties in question. Despite Emperor's absence from the action, the trial court made clear in its opinion that Emperor was not to

be deemed the owner of the apartments that it had purchased. That Emperor was needed as a party is further shown by the fact that Goya joined it as a party in Charles' bankruptcy proceedings. The failure to join Emperor is an unsustainable attempt by Goya to create jurisdiction where none should exist. See, Stewart Tenants Corp. v. Square Industries, Inc., 703 N.Y.S.2d 453, 269 A.D.2d 246 (N.Y.A.D. 1 Dept. 2000) (where it is being asserted that multiple entities are alter egos, all entities must be joined). Since the joinder of this required party would have destroyed diversity, the matter should have been dismissed as the court would be without jurisdiction if the necessary joinder were made.

POINT V

PROPERTIES OWNED BY LILIANE, KALIF AND EMPEROR WERE UNCONSTITUTIONALLY TAKEN WITHOUT DUE PROCESS OF LAW

The Fifth and Fourteenth Amendments of the U.S. Constitution guarantee that the Petitioners shall not be deprived of their properties without due process of law. However, as more particularly set forth in Points I – IV, supra, the courts below took the Petitioners' properties without subject matter or personal jurisdiction, by depriving them of a jury trial, and by determining matter without fair notice to the Petitioners, each of which deprived them of due process of law.

CONCLUSION

For the reasons stated above, Petitioners respectfully request that this Court issue a writ of certiorari to review the decision of the United States Court of Appeals for the First Circuit in this matter.

Respectfully submitted,

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April 5, 2001

Appendix

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

GOYA FOODS, INC.	:	
Plaintiff,	:	
		Civil No. 95-2411(JAF)
v.	:	
ULPIANO UNANUE CASAL, a/k/a CHARLES UNANUE; LILIANE UNANUE, and KALIF TRADING, INC.	:	
Defendants.	:	

OPINION AND ORDER

Before the court are codefendants Ulpiano and Liliane Unanue's motions under Fed. R. Civ. P. 12 to dismiss plaintiff Goya Foods, Inc.'s complaint for lack of personal jurisdiction. Defendants also argue that venue is improper because there is no personal jurisdiction over them. 38 U.S.C. § 1406 (1988). Plaintiff has opposed defendants' motion. As the parties have submitted memoranda and affidavits in support of their positions, the

motion will be treated as one for summary judgment under Fed. R. Civ. P. 56. Summary judgment is rendered if the material facts are undisputed and if defendant is entitled to judgment as a matter of law. Marrero-Garcia v. Irizarry, 33 F.3d 117 (1st Cir. 1994). Having examined the parties' respective arguments, we DENY defendants' motions.

I.

This case is yet another chapter in a dispute among the heirs to the Goya empire that has been litigated with tenacity by all parties in Puerto Rico and other jurisdictions on the mainland. See, generally, In re Unanue-Casal, 164 B.R. 216 (D.P.R. 1993), aff'd, 32 F.3d 561 (1st Cir. 1994), cert. denied, __ U.S. __, 115 S.Ct. 1098 (1995). The present complaint alleges that defendant Ulpiano Unanue-Casal fraudulently transferred property to his wife Liliane, and to Kalif Trading, Inc., a dummy Panamanian company that serves as defendants' *alter ego* to prevent plaintiff from enforcing a $6.9 Million judgment it obtained against

Mr. Unanue-Casal in the New Jersey Superior Court. Subject matter jurisdiction of this court is invoked under 28 U.S.C. § 1332 (1988).

Plaintiff previously raised this fraudulent transfer claim in 1991, in an adversary proceeding as creditor in defendant Ulpiano Unanue-Casal's Chapter 7 case. See Matter or Unanue-Casal, 144 B.R. 604 (D.P.R. 1992), aff'd in part, appeal dismissed in part, 998 F.2d 28 (1st Cir. 1993). Back then, plaintiff sought to set aside allegedly fraudulent transfers made by defendant. Along with Mr. Unanue-Casal, named as defendants were his wife Liliane and Kalif Trading. The complaint in the adversary proceeding alleged that Since 1980, Mr. Unanue-Casal had been fraudulently transferring his assets to his wife and Kalif Trading. Among the assets allegedly transferred were cash, securities, and a condominium apartment at San Gerónimo Condominium in San Juan, Puerto Rico. Plaintiff requested an order declaring the transfers null and

void and restoring the assets to the debtor's estate. On September 12, 1995, the Bankruptcy Court for the District of Puerto Rico dismissed Mr. Unanue-Casal's case. Two months after the dismissal of Mr. Unanue-Casal's bankruptcy case, in November 1995, plaintiff filed the present lawsuit.

II.

The issue is whether defendants' contacts with Puerto Rico are sufficient under Puerto Rico law and the due process clause of the United States Constitution, so that the United States District Court for the District of Puerto Rico may exercise jurisdiction over defendants. Pritzker v. Yari, 42 F.3d 53 60 (1st Cir. 1994), cert. denied, __ U.S. ____, 115 S.Ct. 1959 (1995). The reach of Puerto Rico's long-arm statute (Puerto Rico Rule of Civil Procedure 4.7) extends to all cases where it is constitutionally permissible. Id. Due process requires that the defendant have certain "minimum contacts with the forum so that maintenance of

the suit does not offend the traditional notions of fair play and substantial justice." International Shoe Co. v. Washington, 326 U.s. 310, 316 (1945). Fewer contacts are required to support jurisdiction when the claim is related to those contacts Vencedor Mfg. Co., Inc. v. Gougler Industries Inc., 557 F.2d 886, 889 (1st Cir. 1977).

From 1962 to 1994, Mr. Unanue-Casal was domiciled in Puerto Rico, and up and until September 1995, he was a resident of Puerto Rico. Docket Document No. 21. Affidavit of Mr. Unanue-Casal. Until very recently, Mr. Unanue-Casal availed himself of this court. For five years, from 1990 to September 1995, Mr. Unanue-Casal was embroiled in the Proceedings of his Chapter 7 bankruptcy case. See In re Unanue-Casal, 164 B.R. 216 (D.P.R. 1993), aff'd, 32 F.3d 561 (1st Cir. 1994), cert. denied, __ U.S. __, 115 S.Ct. 1098 (1995); In re Unanue-Casal, 159 B.R. 90 (D.P.R. 1993), aff'd, 23 F.3d 395 (1st Cir. 1994); Matter of Unanue-Casal, 144 B.R 604 (D.P.R. 1992), aff'd in part

and appeal dismissed in part, 998 F.2d 28 (1st Cir. 1993).

Mrs. Unanue admits that she was a resident of Puerto Rico until June 1986. Docket Document No. 23. Affidavit of Mrs. Unanue. In a deposition taken in October 1990, Mrs. Unanue testified that she makes her home where her husband does. Docket Document No. 34, Exhibit 14. In her motion to dismiss, Mrs. Unanue does not aver or present any evidence that she no longer shares the same residence with her husband.

Plaintiff claims that the Unanues, either directly or through their agents, have both conducted business and participated tortious acts in Puerto Rico. Specifically, plaintiff alleges that defendants fraudulently transferred a condominium apartment located in San Juan, Puerto Rico, to codefendant Kalif.[1] Under the forum's long-arm statute,

[1] This apartment continued to be used by the Unanues at least until November 1995, when this lawsuit was filed. Docket Document No. 12. Exhibit 1

we may take jurisdiction over defendants, since the action arises out of defendants' business transactions and participation in tortious acts in Puerto Rico. 32 L.P.R.A. App. III, R. 4.7(a)(1), (2) (1983).

Defendants have also exhibited sufficient minimum contacts to subject them to our jurisdiction. Ticketmaster-New York. Inc. v. Alioto, 26 F.3d 201, 206 (1st Cir. 1994). This claim arises directly from defendants' alleged fraudulent transfer of their San Gerónimo apartment, located in San Juan, Puerto Rico, to Kalif Trading, in order to defraud Goya. Defendants purposely availed themselves of this court to protect this property interest from creditors during the bankruptcy proceedings.

Further, this court has an interest in obtaining an effective resolution of this controversy that has been bouncing back and forth between this court and the bankruptcy court for the last six years. On the other hand, any inconvenience for defendants appears minimal. As

already stated, defendants have litigated in this forum for the last several years without any inconvenience shown or alleged. Nowadays, traveling between Puerto Rico and New York, defendants' alleged new domicile, does not present any onerous circumstance in a constitutionally significant way. See Pritzker, 42 F.3d at 63-64.

In sum, the instant litigation arises out of defendants' fraudulent transfer of real property located in Puerto Rico. Defendants themselves have repeatedly taken advantage of the benefits and protections of Puerto Rico and its legal apparatus. Defendants had to foresee themselves being haled into this court to litigate a matter involving their business transactions in Puerto Rico. The motions to dismiss and for improper venue are DENIED.

IT IS SO ORDERED.

San Juan, Puerto Rico, this 13th day of November, 1996.

s/
JOSE ANTONIO FUSTE
U.S. District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

GOYA FOODS, INC.	:	
Plaintiff,	:	
		Civil No. 95-2411(JAF)
v.	:	
ULPIANO UNANUE CASAL, a/k/a CHARLES UNANUE; LILIANE UNANUE, and KALIF TRADING, INC.	:	
Defendants.	:	

OPINION AND ORDER

Plaintiff, Goya Foods, Inc., moves to strike a demand by defendants, Ulpiano Unanue Casal, a/k/a Charles Unanue, Liliane Unanue, and Kalif Trading, Inc., for a jury trial.

Fed. R. Civ. P. 38 requires the filing of a jury demand within ten days of the filing of the last pleading on the issue to be tried. In this case, as in most, the answers to

the complaint were the relevant pleadings. The only defendant who filed a demand for a jury within ten days of answering is Liliane Unanue. Charles Unanue filed his jury demand nearly six months after the filing of his answer. His demand is time-barred and he has thus waived his Seventh Amendment right to a jury. Defendant Kalif Trading asserts that since they share counsel with Liliane Unanue, her demand for a jury trial should apply to them as well. As hermeneutic an endeavor as the law may sometimes seem, it does not permit courts to divine a vicariously intended jury demand. We cannot interpret Liliane Unanue's jury demand to stand as that of another party.

Liliane Unanue had demanded a jury trial in a timely manner. However, she also happens to be the defendant against whom this court ordered an entry of default because she did not comply with court orders regarding discovery, which provides for the sanction of

entry of default under Fed. R. Civ. P. 37(b)(2). Since default has been entered against her, the trial will be held against the remaining two defendants. After default has been entered under Fed. R. Civ. P. 37(b) (2) and where hearings are required to determine the damages for judgment, a party has no right to jury trial under either Fed. R. Civ. P. 55(b) (2) or the Seventh Amendment. Goldman. Antonetti, Ferraiuoli, Axtmayer & Hertell v. Medfit International. Inc., 982 F.2d 686, 692 n.15 (1st Cir. 1993), quoting Adriana Int'l Corp. v. Thoeren, 913 F.2d 1406, 1414 (9th Cir. 1990), cert. denied, 498 U.S. 1109 (1991), see also, Eisler v. Stritzler, 535 F.2d 148, 153 (1st Cir. 1976) (holding that subsequent to entry of default a hearing, rather than a jury trial, is required to assess damages); 10 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE §55.22(2) (3d ed. 1997). The law is crystal clear that the entry of default against Mrs. Unanue deprives her of the right to a jury trial.

Since all defendants have either waived or lost their right to a jury trial, we **DENY** defendant Charles Unanue's motion for a jury trial. This Order disposes of Docket Documents Nos. 141. 150. 153, and 154.

IT IS SO ORDERED.

San Juan, Puerto Rico, this 6th day of June, 1997.

s/
JOSE ANTONIO FUSTE
U.S. District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

GOYA FOODS, INC.	:	
Plaintiff,	:	
		Civil No. 95-2411(JAF)
v.	:	
ULPIANO UNANUE CASAL, a/k/a CHARLES UNANUE; LILIANE UNANUE, and KALIF TRADING, INC.	:	
Defendants.	:	

MEMORANDUM OPINION, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This case was tried before the court from July 2 to July 16, 1997. The court enters its findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52(a).

I.

This case is another chapter in a long-standing dispute among members of the Unanue-Casal family,

stockholders of the Goya Foods enterprises. The case has been litigated with tenacity by all parties in Puerto Rico and other jurisdictions on the mainland for more than two decades. See generally, In re Unanue-Casal, 164 B.R. 216 (D.P.R. 1993), aff'd, 32 F.3d 561 (1st Cir. 1994), cert.. denied, ___ U.S. __, 115 S.Ct. 1098 (1995). In order to provide the reader immediate background, we briefly recount the events surrounding the Unanue-Casal family controversy.

In 1969, prior to the death of the family progenitor, Prudencio Unanue, a dispute arose between Ulpiano (Charles) Unanue and his brothers backed up by their father, Prudencio Unanue. As a result of the conflict, Charles Unanue was removed from his position as an officer and director of Goya Foods and its various affiliated companies. This event set the stage for a series of lawsuits amongst the siblings.

In 1972, the parties tried to settle their differences by reaching an agreement (1972 Agreement) under which Charles Unanue was to receive certain payments in return for selling his shares in the, Goya companies. A year later, Charles Unanue claimed that the other parties to the agreement had breached it. In 1974, the parties amended the agreement (1974 Amendment): In addition to selling his ownership interest in all of the Goya companies, Charles Unanue agreed never to bring any claim or suit contesting or objecting to his father's will or trust, and not to interfere with the disposition of assets of stock by his father, his estate, the beneficiaries or his brothers. The 1974 Amendment also specified that any signatory to the amended stipulation who lost a suit concerning Prudencio Unanue's will or trust with another signatory had to pay the winner liquidated damages of double costs and attorney's fees. By 1976, Goya had paid Charles Unanue more than

$4.4 Million for his share of the Goya corporations pursuant to the 1972 agreement and the 1974 Amendment.

In 1987, eleven years after Prudencio Unanue's death, Charles Unanue demanded from his brothers his share of his parents' estate. Joseph and Frank Unanue, as trustees of their father's trust, sued Charles Unanue in the Superior Court of New Jersey, Probate Part. They sought a declaratory judgment barring Charles Unanue from maintaining any claims against their father's estate and trust as agreed upon in the 1974 Amendment. In 1995, a New Jersey trial court entered judgment against Charles Unanue and ordered him to pay liquidated damages pursuant to the 1974 Amendment, totalling $6.9 Million. Charles Unanue appealed the judgment, but did not post a supersedeas bond or move for a stay of its enforcement. The New Jersey Supreme Court has the appeal under submission.

In the present case, Goya seeks to collect this judgment against Charles Unanue. Goya alleges that Charles Unanue is the beneficial owner of all the property that ostensibly belongs to his wife, Liliane Unanue, and to Kalif Trading, Inc.,[1] a Panamanian company that allegedly serves as defendant's *alter ego*. Among the assets are cash, securities, and several apartments. Because Charles Unanue claiming to be insolvent, has no property in his name, Goya has been prevented from satisfying the $6.9-Million judgment.

The facts in this case span across two continents and more that two decades, and involve a myriad of transactions. Therefore, we have organized our findings

[1] This court entered the default of Liliane Unanue and Kalif Trading for failure to comply with court orders. See Docket Document Nos. 20 & 104. Notwithstanding that fact, the record confirms that the court liberally allowed Liliane Unanue to present evidence at trial. See Fed. R. Civ. P. 1.

along spacial lines for a better comprehension of the conclusions of law that follow our findings of fact.

A. Puerto Rico Transactions.

In 1968, Charles and Liliane Unanue acquired Apartment 5A at the San Gerónimo Condominium, 860 Ashford Avenue, San Juan, Puerto Rico. Three years later, in 1971, they transferred the property to Emperor Equities, Inc. The corporation was solely owned by Liliane Unanue, with Charles Uñanue serving as an officer of the corporation until 1988. Defendants admitted at trial that they decided to transfer the property to this corporation on counsel's advice to avoid any claim that Charles Unanue had a proprietary interest in the apartment. Back then, Charles Unanue was in contested litigation with Goya, and some of the claims sought money judgments against him.

By November 1972, Emperor Equities had purchased two more apartments at the San Gerónimo Condominium: Apartment 5D and Penthouse 11B. At that

time, Charles Unanue had already receive substantial payments from Goya. Although the apartments belonged to the corporation, defendants moved their residence to the penthouse in 1973.

Emperor Equities eventually sold or transferred Apartment 5D and Penthouse 11B. In August 1983, Emperor Equities transferred Penthouse 11B to Kalif Trading, the Panamanian company. In 1991, it sold Apartment 5D to a third party; after the sale, most of the sale proceeds were transferred to a Swiss bank account to ensure that Goya would be unable to attach the funds.

B. New York Transactions

After Charles Unanue had received all his settlement payments from Goya, both Charles and his wife Liliane participated in a series of real estate and securities transactions in New York.

In March 1976, Liliane Unanue bought shares in a cooperative apartment at 625 Park Avenue in New York.

Despite a very low purchase price of $28,000, Liliane Unanue still had to borrow money from Citibank for this transaction because she had no liquid assets. There is no documentary evidence as to who eventually paid off that loan. Although the purchase price was only $28,000, maintenance payments were $3,000 a month. Charles Unanue, and not Liliane, guaranteed to the coop board the maintenance payments. Moreover, the apartment required extensive renovations and Charles Unanue procured insurance and became the insured party in connection with these renovations.

Several years later, in 1981, Liliane Unanue purchased an apartment at the Sutton House, on East 52nd Street. Charles Unanue had leased this apartment since 1969. The person or entity who paid for the Sutton House apartment did so with a bank check drawn on Credit Suisse in New York. At the time, only Kalif Trading had an

account at that bank. Eventually, this property was sold to a third party.

Charles Unanue also invested in securities. In January 1977, Charles Unanue provided a certified financial statement to First National City Bank (Citibank). He listed as his largest asset a Merrill Lynch securities account, denominated "Mr. Charles Unanue A/C No. 2," with a net value of $1,449,000. He listed another account as "Citibank Custody Account," which had a cost value of $158,640, and a market value of $242,390. Later that same year, in November, Charles Unanue provided Merrill Lynch with personal financial information. He declared that he had at least $2,000,000 in securities. Six months later, in May 1978, Charles Unanue individually submitted a financial statement to Citibank. Charles Unanue listed the "Mr. Charles Unanue A/C No. 2," with a value of $1,977,783 net of margin debt. Finally, in September 1978, an internal memorandum from Citibank stated that Charles

Unanue's equity in his Merrill Lynch accounts was approximately $2.5 Million.

In spite of this $2.5 Million equity, Charles Unanue alleges that he had no personal funds left by 1980. He claims that taxes, attorney's fees, litigation, and living expenses consumed all his wealth, but he has no documentation to support his claim. On the other hand, Goya argues that Charles Unanue maintained substantial assets in the name of Kalif Trading. In November 1980, all the securities in the "Mr. Charles Unanue A/C No. 2" account deposited first at Merrill Lynch and later at E. F. Hutton, were transferred to a new E.F. Hutton account in the name of Kalif Trading, Inc. The securities transfer from the Mr. Charles Unanue No. 2 account to the Kalif Trading account was effected in a letter signed by Liliane Unanue on behalf of Kalif Trading.

During the eighties, over $1 Million in checks were drawn from Kalif Trading's bank accounts at the Dresdner

Bank and Credit Suisse payable to or for the benefit of Charles and Liliane Unanue. The Unanues deposited more than $700,000 in their personal checking accounts. In addition, checks representing thousands of dollars were drawn payable to the San Gerónimo Condominium Association, to the management of the Park Avenue and Sutton House apartments, to Emperor' Equities, casinos, and credit card companies. Charles Unanue signed virtually all the checks.

C. **Spain Transactions**

In May 1972, Liliane Unanue acquired a real estate villa in Fuengirola, Province of Málaga, Spain. She paid for the property in installments over a period of four years, ending in 1976. Defendants testified that Liliane Unanue paid for the property with her own funds. There is no documentation confirming the source of the money.

D. France Transactions

In 1985, the Société Hermitage Global, a Panamanian corporation owned solely by Liliane Unanue, bought an apartment in Paris, France. The apartment was subsequently transferred to Liliane Unanue.

II.

A. Kalif Trading as Charles Unanue's *alter ego*

Goya seeks to impose liability on Kalif Trading for the judgment it obtained against Charles Unanue in the New Jersey Superior Court, contending that the corporation is an *alter ego* of Charles Unanue. It requests that we pierce the corporate veil and impose Charles Unanue's obligation on Kalif Trading.

1. Governing Law

Because Kalif Trading was involved in transactions in New York and Puerto Rico, we are faced with the threshold issue of which state law applies to this issue. Where the court's jurisdiction over the asserted claim arises

from the diversity of the parties, as in this case, the court applies the rules regarding choice of law of the forum state. In re Dupont-Benlate Litigation, 877 F. Supp. 779, 783 (D.P.R.. 1995). In Puerto Rico, courts have applied the "most significant contacts" test in cases involving tortious damages, contractual breaches, and the judicial process of piercing the corporate veil. A.M. Capen's Co. v. American Trad. & Prod. Corp., 74 F.3d 317, 321 (1st Cir. 1996); Wadsworth, Inc. v. Schwarz-Nin, 951 F.Supp. 314, 320-21 (D.P.R. 1996); Fornaris v. American Surety Co., 93 D.P.R. 29 (1966). Among the contacts to consider are the parties' place of incorporation and of business, the place where the injurious conduct occurred, the place where the injury materialized, and the place where the relationship between the parties is centered. 953 F.Supp. at 321-22.

In this case, Goya alleges that Charles Unanue has used Kalif Trading to launder his personal funds and conduct his personal business. Goya has presented

documentary evidence that in November 1980, Charles Unanue transferred all the securities in his E.F. Hutton account in New York to a newly-opened E.F. Hutton account also in New York and registered in the name of Kalif Trading. In addition, New York was the center of Kalif Trading's banking transactions, from where Charles Unanue issued checks in the corporation's name and where the corporation's funds were located. It also appears that Charles Unanue paid for the Sutton House apartment and for maintenance payments of the Park Avenue apartment with Kalif Trading's funds located in New York. From these facts, we find that New York has more significant contacts with the matter at hand than any other possible jurisdiction. Therefore, New York law will govern our determination of whether to pierce the corporate veil in this case.

2. Piercing the Corporate Veil

It is a well-established principle of corporate law that "a corporation exists independently of its owners, as a separate legal entity, . . . and that it is perfectly legal to incorporate for the express purpose of limiting the liability of the corporate Owners." Morris v. Department of Taxation, 623 N.E.2d 1157, 1160 (N.Y. 1993). Courts have found, however, circumstances that require the piercing of the corporate veil in order to prevent fraud or achieve equity. State of New York v Easton, 647 N.Y.S.2d 904, 908 (N.Y. Sup. Ct. 1995). There exist two modalities for piercing the corporate veil. One is the classic piercing of a corporation's charter to impress the debts of a corporation upon its owners. The other, which is the one sought by Goya, is available when the court disregards the corporate form to reach the assets of a corporation for the debts of its owners. This modality is known as reverse piercing. Id. at 908-09. See generally, 1

W. Fletcher, Cyclopedia of the Law of Private Corporations §§ 41-41.10, 41.70 (rev. perm. ed. 1990).

Regardless of the modality used, courts will evaluate the attendant facts and equities of each case in deciding whether to disregard the corporation's separate identity, since piercing the corporate veil has been characterized as an equitable remedy. David v. Glemby Co., Inc., 717 F. Supp. 162, 166 (S.D.N.Y. 1989); Easton, 647 N.Y.S.2d at 908. And because of the equitable nature of the remedy, the court will intervene even if the alleged wrongdoer is not a legal owner of the corporation but an equitable one, as alleged in this case. Id. at 909. Although no bright-line rules govern the different circumstances when courts will deny corporate independence, courts have generally required a showing that: "(1) [T]he owners exercised complete domination of the corporation in respect to the transaction attacked; and, (2) that such domination was used to commit fraud or wrong against the

plaintiff which resulted in plaintiff's injury." Easton, 647 N.Y.S.2d at 908; citing Morris, 603 N.E.2d at 1161.

Here, we must start by expressing that the story of Kalif Trading and the accounts surrounding what appears to be its fictional owner, Mr. Mohammed Kalif, are incredible. Charles and Liliane Unanue testified that Mr. Kalif is an old friend of Mrs. Unanue's family. He supposedly is a wealthy octogenarian Arab with unknown address somewhere in the Middle East. The Unanues allegedly have met up with him in such far away locations as Istanbul and Beirut. In spite of the bulky binders of exhibits that the defendants have submitted and the many discovery requests made by Goya, the defendants have not provided a scintilla of evidence as to Mr. Kalif's existence or whereabouts. Goya tried to contact Mr. Kalif through an attorney in Istanbul, with no results. The voluminous trial record before us contains only one document, a 1979 bank account signature card from the Dresdner Bank, bearing a

purported signature of Mr. Kalif. At trial, Charles Unanue admitted, however, that he may have signed the name himself.

During the 1970's, Mr. Kalif allegedly transferred approximately two million dollars to Charles Unanue and instructed him to invest the money in Charles Unanue's name. At the time, Mr. Kalif desired to invest in the United States, but did not want the funds and investments that Charles Unanue was handling to be traced to him. Although Mr. Kalif wanted to remain anonymous, in June 1979, Charles Unanue traveled to Panama for the purpose of incorporating Kalif Trading, a company whose namesake was precisely Mr. Kalif. Days after its incorporation, the company issued general and unrestricted powers of attorney to Charles and Liliane Unanue, and to Mr. Kalif. Charles Unanue has been the only one who has used his power of attorney extensively to manage all the company's accounts.

The largest of these accounts was the investment account maintained at E.F. Hutton. The trading records for this account demonstrate that Charles Unanue must have spent a considerable amount of time making investment decisions and dealing with brokers, and yet Charles Unanue did not receive any compensation for his efforts. To the contrary, the Unanues testified that when Charles Unanue allegedly became insolvent, they were forced to borrow money from Mr. Kalif. However, there is no documentation to sustain that any bona fide lending ever occurred.

On the other hand, there is documentary and circumstantial testimonial evidence that Mr. Kalif is a fictional character and that Kalif Trading is the mere *alter ego* of Charles and Liliane Unanue. There appears to be no geographical limitation on Charles Unanue's empowerment to act on behalf of the company. He has managed the company's accounts in America, as well as in Europe.

Charles Unanue used his address in Fuengirola, Spain, as the company's address on all bank and securities accounts. Charles and Liliane Unanue are named on the various opening and signature documents for Kalif Trading's accounts.

The evidence, further shows that Charles Unanue managed the company without ever keeping a proper set of financial books and records. There is only one corporate meeting reflected in the company books. This meeting took place in 1983 in Panama. Charles Unanue served as president and Liliane Unanue as secretary of the corporation. At this single meeting, Liliane Unanue was named secretary of Kalif Trading and Mr. Kalif was named president and director. Two other directors, Mr. Said Nazif Ibrahim and Mr. Mehdat Nabih Fakim, were appointed. The existence and whereabouts of these two gentlemen remain as unknown as that of Mr. Kalif. When Charles Unanue was confronted with the prospect of providing

evidence about Mr. Kalif in this litigation, Mr. Kalif supposedly removed himself from the directorship of Kalif Trading and turned over the company to Liliane Unanue in 1996. Mrs. Unanue then named herself president and treasurer of the corporation.

In conclusion, we find that Charles Unanue is the equitable owner of every asset nominally held in the name of Kalif Trading, to wit, the bank and securities accounts and Penthouse 11B at San Gerónimo Condominium. Since the corporation's creation in 1979, Mr. Unanue has exercised complete dominion and control over the corporation's assets and has intermingled his financial affairs with those of the Panamanian corporation.

B. Assets in Liliane Unanue's Name

Goya also contends that Charles Unanue is the beneficial owner of substantially all the assets held in his wife's name. Charles and Liliane Unanue claim that she is the sole proprietor of all the residences that Goya claims

belong to him. Liliane Unanue claims to be independently wealthy and tried to prove that she alone purchased the residential properties in Puerto Rico, New York, Spain, and France.

After careful consideration of the trial record, we find that Liliane Unanue, like Mr. Kalif, is an *alter ego* of Charles Unanue. In considering whether Liliane Unanue is Charles Unanue's second self, we found no applicable New York or Puerto Rico case law. These two jurisdictions have the most significant contacts with the issue at hand, and New York and Puerto Rico law can best assist in our analysis. A.M. Capen's Co., 74 F.3d at 322. We consequently borrow with modifications the analysis applied in the New York corporate *alter ego* cases discussed previously, as well as bankruptcy precedent where the debtor has transferred assets with the intent of defrauding. creditors, 11 U.S.C. § 727(a) (2) (1988). This court has considered such factors as the control that Charles

Unanue has exercised over Liliane Unanue's properties, the benefit and use of Liliane Unanue properties by him, the manner in which he treated the properties, and the consideration that Liliane Unanue provided for the properties. See Salomon v. Kaiser, 722 F.2d 1574, 1582 (2d Cir. 1983) (insolvent debtor purchased two homes with his own money, but had title to both placed in the name of his wife, who provided no consideration for the transfer, and debtor continued to retain possession, benefit, and use of the properties and treated them as his own, thus establishing a scheme to defraud creditors); EFA Acceptance Corporation v. Cadarette, 601 F.2d 648, 651-52 (2d Cir. 1979) (bankrupt transferred car, boat, and trailer to his fiancée without consideration some three weeks prior to filing for bankruptcy and continued to use the property, demonstrating intent to shield assets from creditors); In re Bottone, 209 B.R. 257 (Bankr.D.Mass. 1997) (material question of fact existed as to whether debtor, by continuing

to reside rent-free in home which he had conveyed to his wife, was effecting a continuing concealment of his interest in home, precluding summary judgment in proceeding brought to deny debtor's discharge).

As much as we liberalized the constraints imposed upon Liliane Unanue in the context of her default, the origins of Mrs. Unanue's wealth are totally unverifiable. Neither Charles nor Liliane Unanue have any documentation to prove that her wealth ever existed.

Liliane Unanue's family was allegedly an affluent Bulgarian family (the Dalkalovs) who suffered the hardships of World War II, but who managed nevertheless to remove part of their wealth and properties from their war-torn country before the Communists took over. However, the only documentary evidence of- the existence of this wealth was provided by Mrs. Vivian Schultz, Liliane's sister, who located and produced at trial certain bank books relating to savings accounts held in a bank in

Sophia, Bulgaria, before World War II. The accounts were in the names of Liliane's father, mother, and Mrs. Schultz. The amounts that appear deposited are modest in comparison to the alleged family fortune and there is no explanation as to how these funds were ever transferred outside of Bulgaria.

At trial, Liliane Unanue testified that during the 1950's and 1960's, her mother gave her substantial family assets which included cash, jewelry, gold bullion, artwork, furniture, and antiques. Owing to the fact that such bestowal occurred decades ago, she was allegedly unable to provide even an estimate of her wealth at any time, either in the United States or Europe. However, her sister Vivian, older than Liliane and who allegedly received cash from her mother on or about the time that Liliane Unanue did, was able to recollect, out of memory, that between 1956 and 1978, she brought into the United States approximately $200,000. There is no documentation of any of the assets

transferred or imported into the United States, although Liliane Unanue and her former husband, Mr. William Bates, testified that she did bring some furniture, artwork, and antiques into this country. The total absence of documentation or verifiable information as to the sources of Liliane Unanue's alleged wealth stands in stark contrast to the bulk of photocopies of hotel bills and airplane ticket receipts that the Unanues have furnished to prove that their lifestyle drained them of all their liquid assets.

An attempt to account for Mrs. Unanue's wealth is contained in two documents submitted by Goya. The first is a form providing financial information to Merrill Lynch in November 1977. The form indicates that Liliane Unanue's net worth at the time included just $128,000 in securities. She made no mention of any of the property that her mother allegedly gave her. The second document, prepared only a year later and signed by Charles Unanue on Liliane Unanue's behalf, is a certified financial statement

that Mrs. Unanue submitted to Citibank. Mrs. Unanue represented that she had cash in the amount of $37,000, securities totaling over $500,000, jewelry with an estimated value of $72,300, artwork of $133,400, and her furniture and antiques of $117,000. No mention of the gold bullion was made. These documents do not aid us in determining the sources of Liliane Unanue's independent wealth. By 1977, Charles Unanue had already received all the settlement payments from Goya. Therefore, Liliane Unanue's assets could have very well been provided to her by Charles Unanue and not by her parents as alleged.

In spite of her purported wealth, Mrs. Unanue never invested in real estate prior to marrying Charles Unanue in 1967. Although she had lived in the United States since the late 1950's, she never owned any real property in this country. Yet, suddenly, one year after her marriage to Charles, Mrs. Unanue began her acquisition of several residences here and abroad. As with the story of Mr. Kalif,

we are again confronted with defendants' bare allegations, a dearth of documentation, and the incorporation of entities for the only apparent corporate purpose of concealing assets, making it very difficult to give credibility to defendants' version of facts.

As to the three apartments located in Puerto Rico, it appears that Liliane Unanue incorporated Emperor Equities for the only purpose of transferring title to the Puerto Rico apartments. The first of these apartments was Apartment 5A, San Gerónimo Condominium, which the Unanues bought in 1968. During trial, the Unanues admitted that they transferred Apartment 5A to Emperor Equities in 1971 to avoid any claim that Charles Unanue had an interest in the San Gerónimo apartment. That being the case, such sale never came into existence under Puerto Rico contract law. Article 1213 of the Puerto Rico Civil Code bases a valid contract on "(1) [t]he consent of the contracting parties; (2) (a] definite object which may be the subject of

the contract; (3) [t]he cause for the obligation which may be established." 31 L.P.R.A. § 3391 (1990). The Civil Code states further that "[c]ontracts shall be binding . . . provided the essential conditions required for their validity exist." 31 L.P.R.A. § 3451 (1990). A contract that lacks any of these necessary elements is null from its inception and, therefore, the statute of limitations does not affect it. Rodriguez v. Sucesión Pirazzi, 89 D.P.R. 506, 547 (1963). "Contracts without consideration or with an illicit one have no effect whatsoever. A consideration is illicit when it is contrary to law and good morals." 31 L.P.R.A. § 3432 (1990). The sale contract of Apartment 5A lacked consideration. Charles Unanue never received any type of consideration for the sale of the property. The sale of the property was plainly a scheme to prevent anyone from discovering or attaching Charles Unanue's interest in the property.

By November 1972, when Charles Unanue had already received more than $500,000 in cash payments from Goya, Emperor Equities had purchased two more apartments at San Gerónimo for a total of $220,000. Although there is no evidence as to who exactly provided the funds for the purchase of these apartments, it can be inferred that Charles Unanue did with the proceeds received from Goya, especially since Liliane Unanue has been unable to provide any evidence as to her financial means for such investment. Our inference is supported by the 1978 financial statement that Charles Unanue submitted to Citibank. In that statement, Mr. Unanue listed a $223,000 loan receivable from Emperor Equities.

Four years after the purchase of the San Gerónimo apartments, Liliane Unanue bought the Park Avenue apartment for the nominal amount of $28,000. Despite all her professed wealth, she was forced to borrow money from Citibank to pay for the apartment, allegedly because

she had no liquid assets. Again, it remains a mystery who ultimately paid for it, if not Charles Unanue, who by that time had received the millionary payments from Goya.

Charles Unanue, and not Liliane, also appears to be the *de facto* owner of the house in Fuengirola, Málaga, Spain, and the Paris apartment. Liliane Unanue contracted to acquire the Spanish property when Charles Unanue had already received over $100,000 from plaintiff. As to the Parisian apartment, once more we find a Panamanian corporation as purchaser of the real property, which was eventually transferred to Liliane Unanue's name. There is no documentary evidence that Mrs. Unanue paid for these residences out of her own funds, as defendant adamantly claims. Defendant points to the monies derived from the selling of Liliane Unanue's furniture, jewelry or art as the source of funding for these purchases, but loses sight of the fact that these sales took place in the 1990's, two decades

after the Spanish house was bought and one decade after the Paris apartment was purchased.

In sum, the credible evidence in this case points to the fact that Charles Unanue paid for the properties held in Liliane Unanue's name with the payments he received under the 1972 Agreement and 1974 Amendment. Charles Unanue's defense that the purchase funds derived from gifts Liliane Unanue received from her well-to-do Bulgarian family is uncorroborated by evidence other than Charles and Liliane Unanue's testimony. While the testimony of a credible witness may be sufficient to prove a point, here the lack of documentation, coupled with the incredible account surrounding Mr. Kalif and his unusual relationship with the Unanues, does not allow us to give credibility to the claimed Daskalov fortune. Given the testimonies of Mrs. Schultz and Mr. Bates, it is not difficult to accept that the Daskalovs were an upper middle-class family that managed to remove from their country

sufficient funds to relocate elsewhere. But it is too much to ask that we give credibility to the account of the magnitude of the Daskalov wealth without any evidence as to how much it was and how it was invested, managed, and kept.

In addition, Charles Unanue has benefitted from the use and enjoyment of all these residences, and in many occasions referred to them as his own in letters to third parties. He also contributed to the maintenance of these properties throughout the years. We cannot countenance Charles Unanue's device of hiding his assets in the name of his wife for the purpose of impairing his creditors.

III.

In light of the foregoing, judgment shall be entered in favor of Goya Foods, Inc., and against Charles Unanue and his alter egos, Kalif Trading, Inc., and Liliane Unanue, allowing plaintiff to execute the New Jersey $6.9-Million judgment against the defendants' properties described here.

Because Kalif Trading is Charles Unanue's *alter* ego, a money judgment shall be entered by this court against Kalif Trading in the full amount for which Charles Unanue is indebted to Goya as ordered by the New Jersey courts, including Goya's right to execute judgment over Penthouse 11B, San Gerónimo Condominium, 860 Ashford Avenue, San Juan, Puerto Rico.

Regarding Liliane Unanue, the court recognizes plaintiff's right to execute judgment over the properties known as the Sutton Houses apartment in New York City and any residence registered to her name, including the Fuengirola, Málaga, Spain, villa and the Paris apartment.

The court also concludes that Charles and Liliane Unanue acted with intent to defraud creditors by transferring, removing, and concealing property, records, information, and other financial information.

Attorney's fees and costs are imposed upon the defendants. Final execution of judgment will not be

authorized until this case is reviewed by the U.S. Court of Appeals, First Circuit, and the New Jersey Supreme Court addresses the merits of the pending appeal, and only if the result is favorable to Goya, unless good and sufficient surety is posted.

IT IS SO ORDERED.

San Juan, Puerto Rico, this 31st day of October, 1997.

s/
JOSE ANTONIO FUSTE
U.S. District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

GOYA FOODS, INC.	:	
Plaintiff,	:	Civil No. 95-2411(JAF)
v.	:	
ULPIANO UNANUE CASAL, a/k/a CHARLES UNANUE; LILIANE UNANUE, and KALIF TRADING, INC.	:	
Defendants.	:	

JUDGMENT

On the basis of the Memorandum Opinion, Findings of Fact, Conclusions of Law, and Order subscribed by the court today, Judgment is entered in favor of Goya Foods, Inc., and against Charles Unanue and his *alter egos,* Kalif Trading, Inc., and Liliane Unanue, allowing plaintiff to execute the New Jersey $6.9-Million judgment against the defendants' properties described in said opinion and order.

Because Kalif Trading is Charles Unanue's *alter ego*, a money judgment is entered by this court against Kalif Trading in the full amount for which Charles Unanue is indebted to Goya as ordered by the New Jersey courts, including Goya's right to execute judgment over Penthouse 11B, San Gerónimo Condominium, 860 Ashford Avenue, San Juan, Puerto Rico.

Regarding Liliane Unanue, the court recognizes plainuff's right to execute judgment over the properties known as the Sutton House apartment in New York City and any residence registered to her name, including the Fuengirola, Málaga, Spain, villa and the Paris apartment.

Attorney's fees and costs are imposed upon the defendants. Final execution of judgment will not be authorized until this case is reviewed by the U.S. Court of Appeals, First Circuit, and the New Jersey Supreme Court addresses the merits of the pending appeal, and only if the result is favorable to Goya, unless good and sufficient

surety is posted.

San Juan, Puerto Rico this 31st day of October, 1997.

s/
JOSE ANTONIO FUSTE
U.S. District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

GOYA FOODS, INC.	:	
Plaintiff,	:	
		Civil No. 95-2411(JAF)
v.	:	
ULPIANO UNANUE CASAL, a/k/a CHARLES UNANUE; LILIANE UNANUE, and KALIF TRADING, INC.	:	
Defendants.	:	

AMENDED JUDGMENT OF DECEMBER 14, 1998

On the basis of the Memorandum Opinion, Findings of Fact, Conclusions of Law, and Order subscribed by the court on October 31, 1997, judgment is entered in favor of Goya Foods, Inc., and against Charles Unanue and his alter *egos*, Kalif Trading, Inc., and Liliane Unanue, allowing plaintiff to execute the New Jersey $6.9-Million judgment against the defendants' properties described in said opinion

and order.

Because Kalif Trading is Charles Unanue's *alter ego,* a money judgment is entered by this court against Kalif Trading in the full amount for which Charles Unanue is indebted to Goya as ordered by the New Jersey courts, as outlined above, including Goya's right to execute judgment over Penthouse 11B, San Gerónimo Condominium, 860 Ashford Avenue, San Juan, Puerto Rico.

Regarding Liliane Unanue, the court recognizes plaintiff's right to execute judgment over the properties known as plaintiff's right the Sutton House apartment in New York City, represented by the proceeds of its sale up to $150,000, with interest from November 1995, and any residence registered to her name, including the Fuengirola, Málaga, Spain villa, and the Paris apartment. The stock certificates and shares of Emperor Equities, Inc. held in the name of Liliane Unanue can be the object of the execution of judgment allowed by means of this judgment. Said stock

and shares of Emperor Equities, Inc. shall be deposited with the Clerk of this Court within ten (10) days, to be held in custodia legis. Liliane Unanue shall not transfer or otherwise encumber said stock. The disposition contained in this paragraph is consistent with an order of even date, which is self-explanatory.

Final execution of judgment will not be authorized until this case is reviewed by the U.S. Court of Appeals, First Circuit, and only if the result is favorable to Goya, unless good and sufficient surety is posted.

San Juan, Puerto Rico, this 14th day of December, 1998.

s/
JOSE ANTONIO FUSTE
U.S. District Judge

United States Court of Appeals
For the First Circuit

No. 98-1553
No. 99-1307
No. 99-2056
No. 99-2211

GOYA FOODS, INC.,

Plaintiff, Appellee,

v.

LILIANE UNANUE and KALIF TRADING, INC.,

Defendants, Appellants.

ULPIANO UNANUE-CASAL,
a/k/a CHARLES UNANUE

Defendant.

No. 98-1554
No. 99-1308
No. 99-2057
No. 99-2212

GOYA FOODS, INC.,

Plaintiff, Appellee,

v.

ULPIANO UNANUE -CASAL,

a/k/a CHARLES UNANUE,
Defendant, Appellant.

LILIANE UNANUE and KALIF TRADING, INC.,
Defendants.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO
[Hon. Jose Antonio Fuste, U.S. District Judge]

Before
Selya, Circuit Judge,
Wallace,* Senior Circuit Judge,
and Boudin, Circuit Judge.

Jan Alan Brody with whom Roger Juan Maldonado, Jared Forminard and Balber Pickard Battistoni Maldonado & Van Der Tuin, PC were on consolidated brief for defendants Liliane Unanue and Kalif Trading, Inc.

Ulpiano Unanue-Casal, a/k/a Charles Unanue, pro se.

David J. Eiseman, Jose-Manuel A. de Castro and Golenbock. Eiseman, Assor & Bell on consolidated brief for defendant Ulpiano Unanue-Casal, a/k/a Charles Unanue.

Ira Brad Matetsky, Legal Department, Goya Foods, Inc., with whom Arturo J. Garcia Sola and McConnell Valdes were on consolidated brief for plaintiff.

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* Of the Ninth Circuit, sitting by designation

November 28, 2000

BOUDIN, Circuit Judge. This case involves an effort by a judgment creditor to reach both certain assets of the debtor nominally owned by the debtor's wife, and all assets owned by the debtor's alleged corporate "alter ego," Kalif Trading, Inc. The judgment creditor is Goya Foods, Inc., a major business founded in the 1930s which is now a Delaware corporation with its principal place of business in New Jersey. The debtor is Ulpiano Unanue-Casal, known as Charles, and his bankruptcy estate. The factual background and prior proceedings are as follows.

From the late 1940s until 1969, Charles served as one of the chief officers of Goya, a company founded by his father. In June 1969, in a quarrel among family members, Charles was dismissed and litigation ensued. As a result of settlements in 1972 and 1974, Charles received more than $4 million from Goya and, in exchange, gave up

his interest in Goya. Charles also agreed not to bring any further claim or suit regarding his father's will or estate. The agreement provided for liquidated damages of twice the winning side's litigation expenses, including attorney's fees, if any signatory wrongfully initiated new litigation against another signatory.

In 1987, Charles made a claim for a share of the inheritance from his parents, and litigation in New Jersey state court followed, with his brothers seeking a declaration that Charles had no interest in either his father's estate or his inter vivos trust. In 1990, while the New Jersey litigation proceeded, Charles filed for bankruptcy in Puerto Rico, and his bankruptcy estate thereafter became a party to the New Jersey litigation. In February 1995, the New Jersey court entered a judgment against both Charles and his estate for about $6.9 million, representing liquidated

damages for Goya, a signatory of the 1974 settlement that Charles had violated by making his inheritance claims.[1]

Meanwhile, prior to this New Jersey judgment, Goya had begun adversary proceedings in Charles' bankruptcy case in Puerto Rico, asserting that Charles was concealing his own assets under the names of his wife, Liliane, and two other companies, Emperor Equities, Inc., a Delaware corporation wholly owned by Liliane, and Kalif Trading, a Panamanian corporation which was organized by Charles.[2] On September 12, 1995, the bankruptcy court dismissed Charles' bankruptcy case without granting him a

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[1] The New Jersey judgment was entered, In re Unanue, No. M-128817, slip op. (N.J. Super. Ct. Ch. Div. Feb. 23, 1995), and has since been affirmed, 710 A.2d 1036, 1041 (N.J. Super. Ct. App. Div.), cert. denied, 724 A.2d 801 (N.J. 1998).

[2] In 1991, after Emperor sold a piece of real property and proceeds were transferred to a Swiss bank account in Liliane's name, the bankruptcy court restrained remaining sales of real property pendente lite. See Quiros-Lopes v. Unanue-Casal (In re Unanue-Casal), 144 B.R. 604, 606-07 (D.P.R. 1992)

discharge. In re Unanue-Casal, No. 90-04490, slip op. at 5 (Bankr. D.P.R. Sept. 12, 1995)

In November 1995, nine months after obtaining the New Jersey judgment for $6.9 million, Goya brought the present action in federal district court in Puerto Rico against Charles, Liliane, and Kalif Trading, seeking to enforce the New Jersey judgment against Charles and against properties that Goya claimed belonged to Charles but were held in the name of Liliane or Kalif Trading. A ten-day bench trial ensued in the district court in July 1997, and both Charles and Liliane testified. On October 31, 1997, the court filed a lengthy decision in Goya's favor, Goya Foods, Inc. v. Unanue-Casal, 982 F. Supp. 103 (D.P.R. 1997). Clarifying amendments to the judgment followed on March 10 and December 14, 1998.

The district court concluded that Charles was the true owner of specified cash, securities and various real properties held in the names of Liliane, Emperor Equities,

and Kalif Trading. The court rejected as false assertions by Charles and Liliane that Kalif Trading was owned by a wealthy Arab (who did not appear at trial), and that a supposed fortune inherited by Liliane from her family accounted for various of the real properties held in her name.

The judgment, as finally amended, determined that Kalif Trading was Charles' alter ego and was therefore responsible for the New Jersey judgment to the full extent of its assets. As for Liliane, the court's judgment provided that Goya could execute only against the following: (1) the proceeds of the Sutton House apartment Liliane had earlier owned in New York but since sold; (2) "any residence registered to her name, including the Fuengirola, Malaga,

Spain villa, and the Paris apartment";[3] and (3) the stock of Emperor Equities, all of which was held in Liliane's name, and which the court directed Liliane to deposit with the court.

Charles, Liliane and Kalif Trading have now appealed from the district court's judgment. They contest the findings of fact and legal conclusions that led the district court to impose liability for the New Jersey judgment on property held in the name Liliane, Kalif Trading and Emperor Equities. They also contend that the statute of limitations and a contractual release debar Goya's claims and say that the district court committed various procedural errors. We consider the merits of those arguments that have not been forfeited.

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[3] Fairly read, the judgment encompasses another New York apartment on Park Avenue which was the subject of evidence at trial and was held in Liliane's name at the time of the judgment. Apart from these three real properties, it is not clear what other real property held in Liliane's name at the time of the judgment was meant to be included.

1. Kalif Trading. It is easiest to begin with the district court's treatment of Kalif Trading, an off-shore company that Charles organized in 1979 and for which he and Liliane have had general power of attorney since incorporation. In November 1980, Charles transferred over $1 million to Kalif Trading in assets from his own securities account. At about this time, he ceased to pay alimony to a former wife and also stopped paying taxes, claiming that he no longer had any income or assets. In August 1983, Kalif Trading was also given title of a penthouse apartment in Puerto Rico previously held by Emperor Equities and apparently acquired with Charles' assets.

At trial, Charles claimed that Kalif Trading was owned by one Mohammed Kalif, but the court found that there was no evidence that Mohammed Kalif existed (he did not appear at trial), and that the company was a vehicle used by Charles to conceal his own assets. This finding

was supported not only by Charles' effective control of the assets, but also by his use of Kalif Trading's bank accounts to pay hundreds of thousands of dollars in bills for Charles and his wife, by the transfer of assets from Charles to Kalif Trading, and by the timing of Kalif Trading's creation.

In imposing liability on Kalif Trading, the district court applied New York law, after finding that Puerto Rico courts would apply a "most significant contacts" test, A.M. Capen's Co. v. American Trading & Prod. Corn., 74 F.3d 317, 320 (1st Cir. 1996), and that New York's contacts with transactions involving Kalif Trading were greater than those of any other relevant jurisdiction. The brief filed for Liliane and Kalif Trading does not dispute the decision to apply New York law; Charles does so in his reply brief, but his arguments are terse, unpersuasive and too late. Rivera-

Muriente v. Agosto-Alicea, 959 F.2d 349, 354 (1st Cir. 1992).[4]

Under New York law, the corporate veil may be disregarded where the challenger shows two facts: (1) complete domination of the corporation by its alleged alter ego, and (2) use of that domination to commit a fraud or wrong against the plaintiff. Morris v. New York State Dep't of Taxation & Fin., 623 N.E.2d 1157, 1160-61 (N.Y. 1993); see also New York v. Easton, 647 N.Y.S.2d 904, 908 (N.Y. Sup. Ct. 1995). Although veil piercing is usually employed to make an individual or a corporate parent liable for the debts of a corporation, so-called "reverse piercing" (which makes the corporation liable for the debts of its

[4] Panama, as the state of incorporation, may well supply the presumptively applicable legal regime for veil piercing claims; but under the Restatement rule, apparently followed in Puerto Rico, New York law could nevertheless be applied where, as here, Kalif Trading's business activities occurred primarily in New York and have no connection to Panama. See Wadsworth, Inc. v. Schwarz-Nin, 951 F.Supp. 314, 320-21 (D.P.R. 1996) (citing Restatement (Second) of Conflict of Laws § 309 (1971)).

owner or parent) is allowed under New York law where the assets at issue are held by the target corporation and the liability is that of the individual who dominates the corporation and is using it to perpetrate a fraud or wrong. Wm. Passalacqua Builders. Inc. v. Resnick Develoners S., Inc., 933 F.2d 131, 138 (2d Cir. 1991).

It may be open to dispute whether Kalif Trading was initially formed for the purpose of shielding assets from Goya. Although the district court's decision so suggests, New York law requires "clear and convincing" evidence of such fraud, Lowendahl v. Baltimore & Ohio R.R. Co., 287 N.Y.S. 62, 76 (N.Y. App. Div.), aff'd, 6 N.E.2d 56 (N.Y. 1936), and such evidence seems lacking because Kalif Trading's formation and the transfer of Charles' assets to it took place after Charles' original litigation with Goya had been settled (in 1972 and 1974) and before Charles made his 1987 claim for a share of his parents' estate.

Nevertheless, even if Kalif Trading's origin is not tainted by fraud, New York still permits veil piercing where the corporate vehicle is being used to inflict "wrongful or inequitable consequences." TNS Holdinas, Inc. v. MKI Sec. Corp., 703 N.E.2d 749, 751 (N.Y. 1998). New York courts have held that this test can be satisfied when a corporation is "a mere shell dominated and controlled by another for the latter's own purposes."[5] Guptill Holding Corp. v. New York, 307 N.Y.S.2d 970, 973-74 (N.Y. App. Div. 1970), aff'd, 292 N.E.2d 782 (N.Y. 1972), is inapposite here because, given Charles' denial of ownership of Kalif Trading, there is no easy way for Goya to levy directly on Charles' formal ownership interest in Kalif Trading.

[5] 888 7th Ave. Assocs. Ltd. P'ship v. Arlen Corp., 569 N.Y.S.2d 16, 17 (N.Y. App. Div. 1991); see also National Union Fire Ins. Co. v. Bodek, 705 N.Y.S.2d 42, 43 (N.Y. App. Div. 2000); Austin Powder Co. v. McCullough, 628 N.Y.S.2d 855, 857 (N.Y. App. Div. 1995).

There is ample proof that Kalif Trading is effectively the alter ego of Charles--who created it, initially funded it with his own assets, managed it, and paid his own and his wife's expenses with its assets. Whether or not it was originally created to shield assets from creditors, it is not a business separate from Charles, and there is no indication it has any owners other than Charles. It appears to us, as to the district court, to be nothing other than Charles himself under another name, and therefore under New York law it is permissible to strip away the corporate fig leaf.

2. Assets in Liliane's Name. The claim as to Liliane's assets is more complicated. In 1968, Liliane and Charles took joint title to an apartment in San Juan, Puerto Rico, and in 1971, during the earlier round of litigation between Charles and Goya, the title to the apartment was transferred to Emperor Equities, Inc., a Delaware corporation wholly owned by Liliane. During and after 1972, the year in

which Charles received the first installment of payments from Goya, Liliane and Emperor Equities developed a pattern of real estate acquisitions in which they obtained title to other luxury residences in Puerto Rico, New York, France, and Spain.

At trial, Liliane claimed that these properties had been acquired with assets provided by her once wealthy Bulgarian family. However, the district court concluded that this story was untrue, being uncorroborated and inconsistent with other evidence. It also concluded that the properties in question had been purchased by Charles, who used and enjoyed all of the residences "and in many occasions referred to them as his own in letters to third parties." Goya Foods, 982 F. Supp. at 112. In substance, the court found that Charles was "hiding his assets in the name of his wife for the purpose of impairing his creditors." Id.

Liliane's brief makes no persuasive attack on the district court's findings, which we find were adequately supported. Rather, the brief concentrates its criticism on the district court's theory of liability. Because the district court described Liliane as Charles' "alter ego" in relation to the acquisitions, Liliane says that the district court wrongly applied to a human being a theory that is only valid in relation to corporations. See, e.g., Werner-Jacobsen v. Bednarik, 946 P.2d 744, 747-48 (Utah Ct. App. 1997) ("An individual cannot be the 'alter ego' of another."). Further, says Liliane, property held in her name belongs to her "even if it were assumed that Liliane obtained her properties with Charles' money and not with her own . . . ."

The district court's use of the "alter ego" language to describe the relationship between Charles and Liliane may be inapt--no New York decision appears to use it in such circumstances--and in New York the property of one spouse certainly is not automatically subject to seizure for

the debts of the other spouse. But New York courts have used the equitable theory of "constructive trust" to allow a third-party creditor to execute judgment on assets nominally owned by someone other than the debtor but, based on the court's findings, actually owned by the debtor himself.[6] It appears to us that, in using the alter ego language, the district court meant only that the properties in question were Charles' property but were merely held in his wife's name.

In some circumstances, even an intended transfer of ownership can be set aside. For example, if a specific transfer from one spouse to another were made without consideration to defraud a creditor, a different set of New York doctrines ("actual or constructive fraud") could be invoked, see Scola v. Morgan, 412 N.Y.S.2d 893, 895

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[6] Duncan v. Laury, 292 N.Y.S. 138, 139-41 (N.Y. App. Div. 1937); cf. Tesmetges v. Tesmetges, 47 B.R. 385, 390-91 (E.D.N.Y. 1984). See generally Latham v. Father Divine, 85 N.E.2d 168, 170 (N.Y. 1949)

(N.Y. App. Div. 1979); 30 N.Y. Jur. 2d Creditors' Rts. & Remedies §§ 300-71 (1997); but in this case there are no detailed findings with respect to each of the individual transactions at issue that would establish fraudulent intent, see In re Montclair Homes, 200 B.R. 84, 96 (E.D.N.Y. 1996), or constructive fraud, see N.Y. Debtor & Creditor Law 55 273-75 (McKinney 1990), nor did the district court purport to make such findings.

However, under the theory of constructive trust, no such specific findings are required if the purchases were with Charles' own funds, the transfers of title to Charles' wife Liliane were merely nominal, and the parties intended that Charles continue to possess beneficial ownership of the properties. See Bankers Sec. Life Ins. Soc'y v. Shakerdae, 406 N.E.2d 440, 440 (N.Y. 1980). This, in substance, is what the district court found. It does not make Liliane personally liable for her husband's debts; but it does mean that the property which he beneficially owns but which

happens to be held in her name can be reached through the constructive trust doctrine for the benefit of his creditors.

Here, the circumstantial evidence of an implicit understanding is strong. The timing of the transactions in relation to prospective litigation, Charles' continued treatment of the properties as his own, the parallels to the deceptive operation of Kalif Trading, and the inferences to be drawn from Liliane's baseless claim that the properties were paid for with family funds all contribute to the conclusion that the real estate in question was Charles' and not Liliane's. Given that Charles and Liliane's "agreement" could be inferred from the circumstances, see In re Estate of Knappen, 655 N.Y.S.2d 110, 111-12 (N.Y. App. Div.), cert. denied, 683 N.E.2d 335 (N.Y. 1997), there is enough to sustain the district court's assessment of the situation under a clear error standard.

Two New York cases, not cited by the parties, make clear that a constructive trust is not automatically justified

to undo a property transfer between spouses even when the purpose of the transfer (in each case, one involving the marital residence) is to protect against present or future claims by the creditors of the transferring spouse.[7] However, those cases are distinguishable for they involved what the New York courts found to be genuine transfers that occurred without an understanding between the parties that the property would remain that of the transferring spouse. In our case, by contrast, the thrust of the district court's findings is that ownership was conveyed in name only.

This lack of an effective conveyance (and the resulting applicability of constructive trust theory) also answers the argument of Charles and Liliane that the statute of limitations bars the effort to reach property held in Liliane's name. Although the New York statute of

[7] Macina v. Macina, 455 N.E.2d 1258, 1259 (N.Y. 1983), aff'd 463 N.Y.S.2d 43 (N.Y. App. Div. 1983); Rossignol v. Silvernail, 635 N.Y.S.2d 772, 773 (N.Y. App. Div. 1995).

limitations requires that suit based on fraudulent conveyance be brought within six years of the transfer or two of discovery (actual or constructive) of the fraud, Wall St. Assocs. v. Brodsky, 684 N.Y.S.2d 244, 248 (N.Y. App. Div. 1999), that is not the theory of recovery. In the case of a constructive trust, the limitations period (six years, Maric Pining. Inc. v. Maric, 705 N.Y.S.2d 684, 685 (N.Y. App. Div. 2000)) begins to run only when "the wrongful withholding" occurs, Augustine v. Szwed, 432 N.Y.S.2d 962, 965 (N.Y. App. Div. 1980); accord Whalen v. Gerzof, 564 N.E.2d 656, 657 (N.Y. 1990), and the original date of transfer is not relevant.

The district court's rationale justifies its judgment to the extent that it recognizes Goya's right to execute against the identified real property held in Liliane's name, specifically, the three named properties in New York, Paris, and Malaga. However, despite its broad literal wording, Goya Foods, 982 F. Supp. at 112, we do not construe the

district court judgment as extending to any residence held in Liliane's name that has not yet been identified in this litigation. The constructive trust doctrine cannot easily be applied to property whose identity and circumstances of acquisition are unknown.

3. Emperor Equities. Next, we consider the various issues raised by Liliane's ownership of Emperor Equities. One set of the real properties at issue were three condominium apartments in Puerto Rico. One was acquired by Charles in 1968, title being taken in the joint names of Charles and Liliane; in 1971, during Charles' litigation with Goya, this property was transferred to Emperor, a corporation whose sole shareholder was Liliane. Two further condominiums in San Juan were acquired in 1972, after Charles received a large initial payment from Goya. They too became properties of Emperor. One was transferred in 1983 to Kalif Trading,

but the other remained in Emperor's name until being sold to a third party in 1991.

Despite its involvement in Charles' and Liliane's real estate transactions, Emperor was not named as a defendant in Goya's district court action seeking to reach assets of Charles held in the names of third parties. Liliane says that this is because Emperor was a Delaware corporation and, as this was also true of Goya, naming Emperor as the defendant would have destroyed diversity jurisdiction. Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267, 267 (1806). Liliane says that it was an error for the district court to order Emperor, a non-party to the litigation, to forfeit its property, since Emperor was not itself a party to the case.

The short answer is that the district court judgment did not purport to reach properties held by Emperor at all. Instead, as clarified by the amended judgment of December 14, 1998, the district court directed that the "stock

certificates and shares" of Emperor held by Liliane (it is unclear why both words were used) should be deposited with the court so that they could be used to satisfy the judgment. Such a judgment was within the district court's power, for Liliane was a party to the case, and reaching securities that she owns does not require that the securities' issuer be a party.

4. Miscellany. There remain two other arguments of importance. First, in his opening brief on appeal, Charles claims that, in seeking to enforce the New Jersey judgment, Goya overlooked a procedural precondition. Since the New Jersey judgment was not initially entered by another federal court, it could not merely be registered in the federal district court in Puerto Rico under 28 U.S.C. § 1963 (1994). Rather, enforcement was governed by Fed. R. Civ. P. 69(a), providing that federal proceedings to enforce any out-of-state judgment of a state court should

follow the practice of the state in which the federal district court sits.

Charles asserts that, under Puerto Rico law, for a foreign judgment to be enforceable in Commonwealth courts, it must first be validated and domesticated in an "exequatur" proceeding in the Superior Court of Puerto Rico. Ex parte Marquez Estrella, 128 D.P.R. 243, 247-56 (1991). This proceeding allows interested parties to raise certain limited defenses against the enforcement of a foreign judgment. Charles says that Goya failed to have the New Jersey judgment validated in this manner, that the New Jersey judgment was therefore "not properly before the District Court," and that lack of an exequatur proceeding deprived Charles of his right to challenge validation of the judgment on the permitted grounds.

It may be (we take no position on the matter) that to enforce a state court judgment in the federal district court in

Puerto Rico, there must be a prior exequatur proceeding[8] or some equivalent opportunity to challenge the non-Commonwealth judgment in the federal proceeding itself. However, Charles and Liliane first made their exequatur argument in July 1999, more than a year and a half after the district court had initially entered judgment against them. Thus, this argument was not made in a timely fashion, whether viewed as subject to the ten-day rule of Fed. R. Civ. P. 59(e) or the more relaxed one-year or reasonable-time restrictions of Fed. R. Civ. 60(b).[9]

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[8] Compare Hibbs v. Yashar, 522 F. Supp. 247, 249-54 (D.R.I. 1981) (Rhode Island statute requiring preliminary judicial screening of medical malpractice cases), with Feinstein v. Massachusetts Gen. Hosp., 643 F.2d 880, 889 (1st Cir. 1981) (Massachusetts law requiring screening of medical malpractice claims by an administrative tribunal). See generally 19 Wright, Miller & Cooper, Federal Practice and Procedure § 4511 (1996).

[9] Neither of the amended judgments substantively altered the original judgment or provided any other excuse for the failure to raise the exequatur issue in timely fashion. See Berwick Grain Co. v. Illinois Dep't of Agric., 189 F.3d 556, 560 (7th Cir. 1999).

The exequatur objection is not one that goes to the district court's subject matter jurisdiction and which might therefore be exempt from the ordinary requirements of timeliness. See Sea-Land Serv.. Inc. v. Ceramica Europa II, Inc., 160 F.3d 849, 852 (1st Cir. 1998). Nor, it is worth adding, is there any indication that Charles and Liliane were precluded from raising in the district court any substantive objections to the enforcement of the New Jersey judgment that might have been asserted in a Commonwealth exequatur proceeding. Charles did claim that the New Jersey court lacked jurisdiction to enter the judgment against him, but he did not pursue this issue on appeal in his opening brief, and it is therefore forfeited.

Second, Liliane claims that the district court erred by entering a default judgment against her and, later, by not affording her a jury trial even though the court ultimately allowed her to present her case on the merits. The district court entered a default against Liliane in March 1997 as a

sanction for repeated failures to comply with court orders. Liliane's earlier demand for a jury trial was then struck on Goya's motion (no other party having made a timely request for a jury trial). Nevertheless, at trial the district court reversed field and allowed Liliane's counsel to offer witnesses and to present a defense, and it then resolved the claims against her on the merits. At no time during the trial did Liliane offer an objection to the bench trial or ask the court to reinstate her jury trial request.

On this appeal, little need be said about Liliane's challenge to the original default. Although the remedy was severe, it followed obstreperous acts and clear advance warning from the district court, and it was not an abuse of discretion. Cf. Faigin v. Kelly, 184 F.3d 67, 84 (1st Cir. 1999); John's Insulation. Inc. v. L. Addison & Assocs., Inc., 156 F.3d 101, 108-10 (1st Cir. 1998). The more troublesome question is whether, insofar as the district court proceeded to try and decide Liliane's case on the

merits, it should also have afforded her the jury trial she originally demanded. In posing this question, we assume dubitante that the original jury trial request was proper.[10]

Assuming that a right to jury trial otherwise existed, it was not preserved. Once the default was effectively withdrawn, Liliane could not proceed to present her case without telling the district court that she wanted the jury request reinstated and then, after losing, complain that a jury should have been afforded. This kind of mouse-trapping, whether deliberate or inadvertent, is forbidden. Daigle v. Maine Med. Ctr., Inc., 14 F.3d 684, 687-88 (1st Cir. 1994). A claim to a jury trial can be forfeited just like any other non-jurisdictional request or objection.

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[10] Imposition of a constructive trust is equitable in nature and, thus, may not trigger the right to a jury trial under the Seventh Amendment. See Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 40-42 (1989); RTC v. Pasquariello, 16 F.3d 525, 531 (3d Cir. 1994); see also Latham v. Father Divine, 85 N.E.2d 168, 170 (N.Y. 1949) ("[A] constructive trust is merely the formula through which the conscience of equity finds expression . . . . (internal quotation marks and citations omitted)).

Appellants present other arguments, including claims that personal jurisdiction over Charles and Liliane was lacking, that Charles was denied adequate discovery, that Charles was entitled to rely on Liliane's request for jury trial, that (according to Charles) New York law does not apply, and that misconduct by Goya warranted sanction and dismissal. However, all of these claims have been raised only in reply briefs, and it is well-settled that the attempt to present issues in this manner is untimely and that such claims therefore need not be considered. Rivera-Muriente v. Agosto-Alicea, 959 F.2d 349, 354 (1st Cir. 1992).

Finally, the appellants argue that a 1974 contractual release given by Goya precludes Goya's present claims. This argument was admittedly not presented to the district court and is therefore forfeited in this court. It is doubtful that such a defense, if not seasonably asserted, could ever

be rescued by the plain error doctrine, but in any event there is no miscarriage of justice in its forfeiture here.

The appellants also have made, or at least insinuated, a variety of other arguments; to the extent these arguments are properly before us, we believe that they are without merit, and we reject them without detailed discussion. For the reasons stated, the judgment of the district court is affirmed with the clarification that insofar as the judgment permits Goya to levy against real properties held in Liliane's name at the time of judgment, it extends only to those real properties identified in the district court proceedings and not other unnamed properties. Appellants have pending a motion for reconsideration of our prior order striking various exhibits, and we now deny the motion to reconsider.

It is so ordered.

United States Court of Appeals
For the First Circuit

No. 98-1553
No. 99-1307
No. 99-2056
No. 99-2211

GOYA FOODS, INC.,

Plaintiff, Appellee,

v.

LILIANE UNANUE and KALIF TRADING, INC.,

Defendants, Appellants.

ULPIANO UNANUE-CASAL,
a/k/a CHARLES UNANUE

Defendant.

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a/k/a CHARLES UNANUE,
Defendant, Appellant.

LILIANE UNANUE and KALIF TRADING, INC.,

Defendants.

JUDGMENT

Entered: November 28, 2000

This cause came on to be heard on appeal from the United States District Court for the District of Puerto Rico, and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed with the clarification that insofar as the judgment permits Goya to levy against real properties held in Liliane's name at the time of judgment it extends only to those real properties identified in the district court proceedings and not other unnamed properties.

By The Court

Clerk.

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a/k/a CHARLES UNANUE,
Defendant, Appellant.

LILIANE UNANUE and KALIF TRADING, INC.,

Defendants.

ERRATA

The opinion of this Court, issued on November 28; 2000, should be amended as follows.

On page 12, line 2 of 2nd paragraph, delete "the".

On page 14, line 6, delete "three named" and add "mentioned above" after "Malaga" and before the period.

On page 15, line 4, replace "the" with "a".

On page 17, line 5, replace "Fed. R. Civ. 60(b)." with "Fed. R. Civ. P. 60(b)."

United States Court of Appeals
For the First Circuit

Nos. 98-1553. 99-1307, 99-2056, and 99-2211

GOYA FOODS, INC.,
Plaintiff, Appellee,

v.

LILIANE UNANUE and KALIF TRADING, INC.,
Defendants, Appellants.

ULPIANO UNANUE-CASAL,
a/k/a CHARLES UNANUE
Defendant.

Nos. 98-1554, 99-1308, 99-2057 and 99-2212

GOYA FOODS, INC.,
Plaintiff, Appellee,

v.

ULPIANO UNANUE -CASAL,
a/k/a CHARLES UNANUE,
Defendant, Appellant.

LILIANE UNANUE and KALIF TRADING, INC.,
Defendants.

BEFORE
SELYA, Circuit Judge,
WALLACE*, Senior Circuit Judge,
BOUDIN, STAHL, LYNCH and LIPEZ, Circuit Judges.

ORDER OF COURT

January 5, 2001.

The panel of judges that rendered the decision in this case having voted to deny the petitions for rehearing and the suggestions for rehearing en banc having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeals be heard or reheard by the Court en banc,

It is ordered that the petitions for rehearing and suggestions for rehearing en banc, be denied.

By the Court:
PHOEBE D. MORSE, Clerk

By: Janice M. O/Neil
Chief Deputy Clerk

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* Of the Northern District of California, sitting by designation.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Constitutional Provisions:

U.S. Const. article IV, Sec. 1

> Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general Law prescribe the Manner in which such Acts, Records and Proceedings shall be probed, and the Effect thereof

U.S. Const. amendment V.

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a present or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offences to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amendment VII.

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by

a jury, shall be otherwise reexamined in any Court of the United States, than according to the rule of the common law.

U.S. Const. amendment XIV, Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statute:

28 U.S.C. § 1738.

The Acts of the legislatures of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possession by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of that court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.